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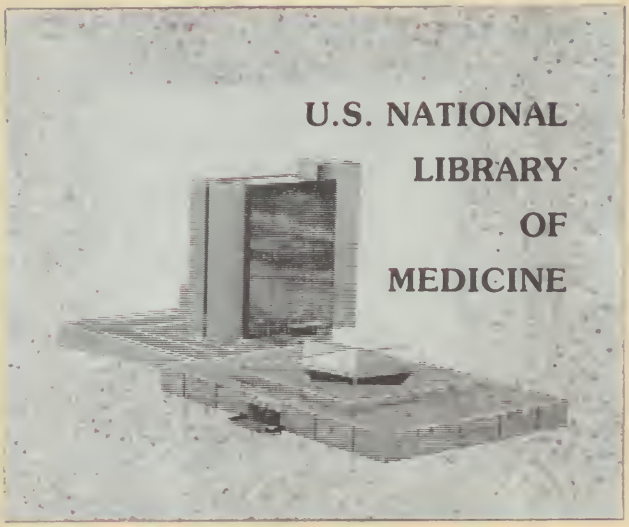
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FINAL REPORT
TO
THE SECRETARY OF THE ARMY
ON
THE NUERNBERG WAR CRIMES TRIALS
UNDER CONTROL COUNCIL LAW NO. 10

FINAL REPORT
TO
THE SECRETARY OF THE ARMY
ON
THE NUERNBERG WAR CRIMES TRIALS
UNDER CONTROL COUNCIL LAW NO. 10

by
TELFORD TAYLOR
Brigadier General, U. S. A.
Chief of Counsel for War Crimes

Washington, D. C. 15 August 1949

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"Final Report to the Secretary of the Army on the Nuremberg War Crimes Trials Under Control Council Law No. 10."

ERRATA

Appendix B (pages 121 through 241 herein), entitled "Nuremberg Trials—War Crimes and International Law" was originally published as a separate pamphlet paginated to conform to the "International Conciliation" series. As an appendix herein, it is paginated chronologically. Therefore, all page number references to Appendix B should be subtracted by the figure 118 to find the proper page within this report.

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DEPARTMENT OF THE ARMY

WASHINGTON 25, D. C.

15 August 1949

Secretary of the Army
Washington 25, D. C.

DEAR MR. SECRETARY:

I have the honor to submit herewith the final report of the Office, Chief of Counsel for War Crimes on the Nuernberg war crimes trials held under the authority of Control Council Law No. 10.

An interim statement on the progress of the trials (attached to this report as Appendix A) was submitted by me to the Secretary of the Army (then the Honorable Kenneth C. Royall) on 12 May 1948. At that time four trials were still in process, all of which have since been concluded by the rendition of judgments. The sentences imposed by the Nuernberg Tribunals in eleven of the twelve cases (all except *United States* v. *Ernst von Weizsaecker*, Case No. 11) have all been reviewed by the Military Governor. With a single exception, in which a death sentence imposed by a Tribunal (in *United States* v. *Oswald Pohl*, Case No. 4) was reduced to life imprisonment, all were confirmed. Seven of the twenty-three death sentences imposed (and confirmed) have been carried out, and the other condemned men are confined at Landsberg Prison in Bavaria, where the jail sentences of the other convicts are being served. Publication of the judgments and other important records of the trials is in process.

This report does not cover the activities of the Secretary-General of the Nuernberg Military Tribunals, who was directly responsible to the Deputy Military Governor. I am advised by the Secretary-General (Dr. Howard H. Russell) that his final report will be submitted to the High Commissioner in due course.

With the submission of this report my task as Chief of Counsel for War Crimes and as Chief Prosecutor for the United States under the London Charter is concluded, and I respectfully request that my assignment in those capacities be terminated forthwith.

Respectfully yours,

Telford Taylor

TELFORD TAYLOR
Brigadier General, USA
Chief of Counsel for War Crimes

INTRODUCTION

Primarily, this report undertakes to describe the creation, organization, and functioning of the Office, Chief of Counsel for War Crimes (OCCWC). The need for such an agency was envisaged by the Theater Judge Advocate (the late Brig. Gen. Edward C. Betts) and the Director of the Legal Division of OMGUS (then Mr. Charles Fahy) in October 1945. The OCCWC was officially established on 24 October 1946, shortly after rendition of the judgment in the first Nuernberg trial before the International Military Tribunal (IMT), and was formally deactivated on 20 June 1949. This report covers the entire period from October 1945 to June 1949.

The basic policies which governed the operations of OCCWC were in part prescribed by higher authority—through OMGUS and the Department of the Army—and in part determined by me as Chief of Counsel for War Crimes. The evolution and execution of these policies are sketched herein. Throughout, principal attention has been devoted to the "executive" and "administrative" operations of the OCCWC, including such matters as the preparation of Military Government Ordinance No. 7 (under which the Nuernberg Military Tribunals were constituted), selection of defendants, methods of interrogation of witnesses and suspects, handling of linguistic problems, and cooperation with other governments in the field of war crimes.

These things may seem of minor importance and prove of little interest to those who are chiefly interested in the actual outcome of the trials, the legal reasoning of the judgments, the historical revelations of the documents and testimony, or the immediate and long-term significance of the trials in world affairs. I have touched on some of the legal and historical features of the trials toward the end of the report, and have dealt with them more fully in the April 1949 issue of *International Conciliation*[1] (attached hereto as Appendix B). In any event, on such subjects there will be no lack of books and articles in the years to come; indeed the Nuernberg bibliography is already sufficiently impressive.

Glamorless as this description of the Nuernberg "machinery" may be, it wants writing. There is more to a judicial process than the records and judgments in the decided cases. The Nuernberg trials were car-

[1] *Nuremberg Trials: War Crimes and International Law,* by Telford Taylor, comprising the April 1949 issue of "International Conciliation" (published by the Carnegie Endowment for International Peace), with a foreword by Dr. James T. Shotwell, President of the Endowment, *infra,* p. 122

ried out under quadripartite authority, but in pursuit of objectives thought to be of benefit to all mankind. It is important, therefore, not only that the documents, testimony, and judgments be widely published, but also that a record be left telling how the individual defendants were selected, who prosecuted and who defended them, and how the charges were drawn, and describing the administrative paraphernalia of the Nuernberg process. This report is an attempt to supply that record, and no effort has been made to "jazz up" the account for the general reader.

HISTORICAL BACKGROUND

The Nuernberg trials, like other war-crimes trials, were based on the proposition that international penal law is judicially enforceable law, and that it therefore may and should be enforced by criminal process. The United States was a leading participant in the planning and execution of the Nuernberg trials, but the basic proposition is not purely or even primarily American, but rather of very cosmopolitan origin. Its roots are ancient, and Nuernberg is by no means the first instance of its application. To trace the historical antecedents of the many war crimes trials held since the conclusion of World War II would be, therefore, a formidable task for any scholar.

Even the conferences, reports, and other events during and after World War II which directly led to the Nuernberg trials furnish material for a historical essay far beyond the scope of this report. The "St. James Declaration" of January 1942, the "Moscow Declaration" of November 1943, the establishment and activities of the United Nations War Crimes Commission, and other important developments of the war and prewar years are dealt with extensively in the very comprehensive *History of the United Nations War Crimes Commission.*[2] Interesting information on the origins of United States policy in this field is contained in the Honorable Henry L. Stimson's account of his service as Secretary of War.[3] How this policy was put into execution, culminating in the London Agreement and Charter of 8 August 1945, is set forth in Mr. Justice Robert H. Jackson's report of his activities as Representative of the United States in the field of war crimes.[4] I shall not here attempt to retrace all these steps.

While the events described in these publications were taking place, the Joint Chiefs of Staff were also concerning themselves with the problem of war criminals. As early as August 1944 they considered a proposed draft of a directive [5] to theater commanders regarding the handling of war-crimes matters, based on a definition of "war crimes" approved by the Judge Advocate General, United States Army, and so phrased as to distinguish "noncriminal" offenses against the laws

[2] Compiled by the Commission itself and published for the Commission by His Majesty's Stationery Office in London (1948), with a foreword by Lord Wright of Durley, the Commission's Chairman.

[3] *On Active Service in Peace and War,* by Henry L. Stimson and McGeorge Bundy, Harper and Brothers, New York (1948), pp. 584–91.

[4] *International Conference on Military Trials,* Department of State Publication 3080, U. S. Government Printing Office, Washington, D. C. (1949).

[5] J. C. S. 1023 (26 August 1944), Annex A to Appendix B.

of war (such as espionage) from "criminal" offenses such as atrocities against civilians:

> The term "war crimes" covers those violations of the laws and customs of war which constitute offenses against person or property, committed in connection with military operations or occupation, which outrage common justice or involve moral turpitude.

The draft directive went on to point out that "guilt may be either as principal or accessory" and that "the taking of a consenting part in the commission of a war crime is also punishable; as for example, omission of a superior officer to prevent war crimes when he knows of, or is on notice as to, their commission or contemplated commission and is in a position to prevent them." It further stated that war crimes "do not include acts committed by enemy authorities against their own nationals," or offenses committed prior to the outbreak of war. The apprehension of suspected war criminals and the collection of evidence were declared to be "military interests of prime importance."

On 1 October 1944 the Joint Chiefs of Staff approved this directive [6] and presented it for consideration by the Combined Chiefs of Staff.[7] At about the same time, pursuant to the instructions of the Secretary of War,[8] a War Crimes Office was established in the Office of the Judge Advocate General of the Army which, by interdepartmental agreement, was to act as the central agency for the State, War, and Navy Departments in handling war crimes.[9]

While the Combined Chiefs of Staff were considering the draft directive, the focus of American policy-making shifted to other levels. As is shown in Mr. Stimson's book, the scope of his war crimes "thinking" was enormously broadened so as to comprehend "the whole scheme of totalitarian war * * * virtually upon the theory of a conspiracy," and the conspiracy "approach" was approved by the President at a conference with Mr. Stimson on 21 November 1944. In January 1945 the President appointed Judge Samuel Rosenman as his personal representative on the war-crimes problem, and by 18 January 1945, at a meeting between Mr. Stimson, Judge Rosenman, the Attorney General (Mr. Francis Biddle), and others, a plan for a large international trial, involving the concept of the criminality of aggressive war, had emerged.[10] This broad program was then em-

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[6] J. C. S. 1023/3 (25 September 1944).

[7] C. C. S. 705 (2 October 1944).

[8] Contained in a memorandum from Mr. Stimson to the Judge Advocate General dated 25 September 1944.

[9] See AG 000.5 (7 Oct. 44) OB–S–A–M of 25 December 1944. By directive WDCSA 000.5 of 30 November 1944 the Assistant Secretary of War (Mr. McCloy) was designated as the representative of the Secretary in all matters involving war crimes. The Assistant Chief of Staff, G–1, WDGS, was empowered to exercise "staff supervision of plans and policies with regard to war crimes", and the Judge Advocate General was directed to refer "matters of basic policy" to the Assistant Secretary of War through the A. C. of S., G–1.

[10] *On Active Service in Peace and War, op. cit. supra,* pp. 585–587.

bodied (22 January 1945) in a memorandum to the President from the Secretaries of State and War and the Attorney General.[11]

These high-level conferences and plans put a stop, for the time being, to further consideration of the war crimes problem by the Joint or Combined Chiefs of Staff. In April 1945 the Joint Chiefs of Staff noted that the above-mentioned memorandum of 22 January to the President "differed in several important respects from the basic concept upon which the directive proposed by the United States Chiefs of Staff * * * was predicated." Accordingly, they advised the Combined Chiefs of Staff that the draft directive which had been under consideration since the previous October [12] could no longer be approved by the United States Chiefs of Staff.[13]

So the matter stood at the time (2 May 1945) of Mr. Justice Robert H. Jackson's appointment as Representative of the United States and Chief of Counsel for the prosecution of war criminals.[14] Thereafter all basic policy problems in the war crimes field were in his hands. When the war in Europe ended a few days later, the Combined Chiefs of Staff authorized the theater commanders in Germany and the Mediterranean to "apprehend and detain" war crimes suspects listed as such by the United Nations War Crimes Commission "without requiring further proof of their having committed war crimes," but the commanders were not as yet authorized to conduct any actual trials.[15]

On 6 June 1945 the general outlines of United States war crimes policy were publicly set forth in an interim report to the President by Mr. Justice Jackson,[16] and thereafter matters once more started to move forward. Mr. Justice Jackson proceeded to Europe and conducted the international negotiations which resulted in the London Agreement and Charter, while a staff was assembled to conduct the large international trial to be held under the authority of the Agreement. On 19 June 1945 the Combined Chiefs of Staff lifted the previous restrictions and authorized [17] the theater commanders in Europe and the Mediterranean to proceed with trials of suspected war criminals other than those "who held high political, civil, or military positions"; such cases "should be deferred pending reference to Combined Chiefs of Staff to ascertain whether it is desired to try such persons before an interna-

[11] Printed in *International Conference on Military Trials, op. cit. supra,* pp. 3–17.

[12] I. e., C. C. S. 705 (J. C. S. 1023/3).

[13] J. C. S. 1023/5 (13 April 1945, approved 21 April 1945), and C. C. S. 705/3 (21 April 1945).

[14] Executive Order 9547 (2 May 1945).

[15] On 25 December 1944, by AG 000.5 (7 Oct 44) OB–S–A–M, the theater commanders had been instructed, pending further orders, that "no war criminals will be tried before military tribunals, except those cases in which the offenses involve the security or the successful carrying out of military operations or occupation."

[16] Printed in *International Conference on Military Trials, op. cit. supra,* pp. 42–54.

[17] See C. C. S. 705/7 (presented to the Combined Chiefs of Staff 8 June 1945).

tional tribunal." [18] In Germany, the Theater Judge Advocate thereafter proceeded to try numerous cases involving violations of the laws of war against United States nationals (usually members of the armed forces),[19] and atrocities committed in concentration camps liberated by United States forces. After the London Agreement was signed, preparations for the holding of the international trial were intensified, Nuernberg was selected as the site, and at the end of August the list of defendants was made public. Thereafter the indictment was drafted, and by the middle of October it had been filed before the International Military Tribunal, then newly constituted pursuant to the London Agreement.

The clarification of American war crimes policy in Mr. Justice Jackson's interim report also enabled work to be resumed on formulating a basic war crimes policy directive for the Allied occupational administration in Germany. A draft directive, prepared by the Informal Policy Committee on Germany (IPCOG), was approved by the Joint Chiefs of Staff on 15 July 1945. Titled "Directive on the Identification and Apprehension of Persons Suspected of War Crimes or Other Offenses and Trial of Certain Offenders," [20] it was subsequently transmitted to the theater commander [21] (General Eisenhower) as an interim directive, and as a statement of United States policy for negotiation with the other occupying powers, in the hope that it would furnish the basis for a quadripartite formulation of war crimes policy applicable throughout occupied Germany. This directive (attached hereto as Appendix C) was the source of and stimulus for the later enactment of Allied Control Council Law No. 10, and for the ultimate establishment of the Nuernberg Military Tribunals and the Office, Chief of Counsel for War Crimes to carry Law No. 10 into effect in the American zone of occupation.

J. C. S. 1023/10

The new directive embodied the broader approach to the problem of war crimes which had originated in the conferences between Mr. Stimson and Judge Rosenman and had been systematically set forth in Mr. Justice Jackson's interim report. Indeed, the definitions in J. C. S. 1023/10 of the crimes which it covered were "lifted" almost

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[18] Also excepted were persons "known also to be wanted by one or more of United Nations in accordance with the Moscow Declaration for trial for crimes committed outside your zone"; these cases were to "be deferred and report made to the CCS." Trials in areas occupied by British forces were to be further postponed "until Royal Warrant establishing special military courts has been promulgated."

[19] By order of 24 February 1945 (AG 000.5 Op JA) General Eisenhower had instructed his subordinate commanders that "Action * * * in cases involving only nationals of other United Nations will normally be limited to cooperation with the appropriate national agencies investigating such cases."

[20] J. C. S. 1023/10 (8 July 1945).

[21] The directive was not actually received in the theater "until a considerable period of time had elapsed subsequent to its publication." *Report of the Theater Judge Advocate, ETO and USFET*, 4 April 1942 to 3 April 1946, p. 40.

verbatim from the report of Mr. Justice Jackson.[22] The scope of individual responsibility for these crimes was to include not only "accessories" and those who had taken "a consenting part" in crime,[23] but also "members of groups or organizations connected with the commission of such crimes" [24] and (as to the crime of aggressive war only) "persons who have held high political, civil, or military * * * positions in Germany or in one of its allies * * * or in the financial, industrial or economic life of any of these countries." [25]

To prepare for the carrying out of the directive by the initiation of criminal proceedings, the theater commander was directed "to identify, investigate, apprehend, and detain all persons whom you suspect to be criminals" under the foregoing definitions of the crimes and scope of responsibility,[26] and "all persons whom the Control Council, any one of the United Nations, or Italy notifies to you as being charged as criminals." The theater commander was ordered to report the names of suspected criminals to the Control Council, and there were additional detailed provisions governing the delivery or "extradition" of suspects from one country to another. The directive provided in very general terms "that appropriate military courts may conduct trials of suspected criminals in your custody" but specified that these courts should be "separate from the courts trying current offenses against your occupation," and that their procedures should be "fair, simple, and expeditious * * * designed to accomplish substantial justice without technicality." As theretofore, the theater commander was to postpone trials of high political, civil, or military officials until it was ascertained whether such persons would be tried before an international military tribunal, as well as trials of persons wanted elsewhere.

General Eisenhower's headquarters made the Theater Judge Advocate (the late Brigadier General Edward C. Betts) responsible for the "effective application" of J. C. S. 1023/10,[27] and about a month later General Betts approved a memorandum by Colonel Charles Fairman [28] embodying recommendations for the execution of the directive.

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[22] Compare the language in paragraph 2, Annex to Appendix A to Enclosure B of J. C. S. 1023/10 (*infra*, pp. 244–245) with the concluding paragraphs of Part III of the Jackson report, in *International Conference on Military Trials, op. cit. supra*, pp. 50–51.

[23] These phrases apparently were derived from the original draft directive of 26 August 1944 (J. C. S. 1023), mentioned *supra*, p. 2.

[24] Presumably derived from Mr. Justice Jackson's proposal in his interim report "to establish the criminal character" of several organizations such as the Gestapo and the SS.

[25] The origin of this very broad phrasing is unknown to me. See *infra*, p. 72.

[26] In the basic directive to the theater commander prescribing the general policies for the United States forces of occupation and the military government of Germany, the theater commander had been directed to arrest and hold numerous categories of "suspected war criminals" and other persons, such as Nazi Party and SS officials, general staff corps officers, and judges and other officials of the People's Courts. (See J. C. S. 1067/6, par. 8b, 26 April 1945.) The entire directive except for the definitions of these categories (which were withheld from publication in order to facilitate additional arrests) was published in *The Department of State Bulletin* for 21 October 1945, pp. 596–607.

[27] This responsibility was imposed by USFET letter to the Theater Judge Advocate dated 20 September 1945.

[28] Chief, International Law Section of the Theater Judge Advocate's office.

Colonel Fairman stressed the enormous scope of the program required by J. C. S. 1023/10—calling as it did for the prosecution of numerous atrocities committed since 30 January 1933—and pointed out the urgent need for immediate planning and recruitment of skilled personnel. He concluded that "considerations of continuity of effort, expert knowledge, and public responsibility already established point to the Office of the U. S. Chief of Counsel [Mr. Justice Jackson's organization at Nuernberg] as the organization upon which reliance should be placed." Following out this suggestion, and by direction of General Eisenhower, J. C. S. 1023/10 and Colonel Fairman's memorandum were brought to Mr. Justice Jackson's attention,[29] and there ensued a series of conferences and interchange of correspondence among Mr. Justice Jackson, General Betts, Colonel Fairman, and the Legal Adviser to OMGUS (then Mr. Charles Fahy). All parties seemed to agree that, in planning for the execution of the directive, Mr. Justice Jackson's organization should be utilized as an administrative base of operations and a possible future source of personnel, and that there was immediate need for some individual to take charge of the project. I was first approached in this connection by Mr. Fahy on or about 20 November 1945, when the first Nuernberg trial (before the International Military Tribunal) opened.

In the meantime, under the direction of Mr. Fahy, J. C. S. 1023/10 had been used as the basis for a draft of a proposed law to be promulgated by the Allied Control Council on the subject of war crimes. Such a draft was approved by the Coordinating Committee of the Control Council on 1 November 1945, and on 20 December 1945, with some changes, it was enacted by the Control Council as Law No. 10.

Control Council Law No. 10 [30]

The purposes of Control Council Law No. 10—the basic occupational enactment on the subject of war crimes and the jurisdictional foundation of all the Nuernberg trials except the first—were, as stated in the preamble, (a) "to give effect to the terms of the Moscow Declaration of October 1943," (b) to give effect to "the London Agreement of 8 August 1945 and Charter," and (c) "to establish a uniform legal basis in Germany for the prosecution of war criminals and other similar offenders, other than those dealt with by the International Military Tribunal."

In the Moscow Declaration, it had been agreed (by the United States, the United Kingdom, and the Soviet Union) that Germans

[29] By letter from General Betts to Mr. Justice Jackson dated 19 October 1945.

[30] Attached hereto as Appendix D. The law was signed for the United States by Gen. Joseph T. McNarney, for the United Kingdom by Field Marshal Montgomery, for France by Lt. Gen. L. Koeltz acting for Gen. P. Koenig, and for the Soviet Union by Marshal G. Zhukov.

accused of crimes and atrocities in one of the formerly German-occupied countries would, after the end of the war, be sent back to that country for trial and judgment. In furtherance of this purpose, Law No. 10 contained elaborate provisions governing the interchange of suspected war criminals among the four occupying powers, and the handling of requests by other Allied nations for the "extradition" of German war crimes suspects from Germany to the requesting country.[31] The Moscow Declaration further provided that "major criminals whose offenses have no particular geographic location" would be punished by "joint decision" of the Allied governments. This provision was fulfilled in part by the first Nuernberg trial under the London Charter, and in part by subsequent trials under Law No. 10 in Nuernberg and elsewhere (particularly in the French zone of occupation).

With respect to the London Agreement and Charter, the effect of Law No. 10 was parallel and the two documents supplemented each other. Major criminals not tried under the one could be tried under the other. Furthermore, the trials under Law No. 10 were to be a means of carrying out such "declarations of criminality" against "groups or organizations" like the SS as the International Military Tribunal might make. The London Charter provided that, if such declarations were made, the signatory governments could thereafter bring to trial individual members of the convicted groups or organizations "before national, military, or occupation courts" and that in such proceedings "the criminal nature of the group or organization is considered proved and shall not be questioned."[32] Law No. 10 authorized the establishment by each of the four zone commanders of tribunals competent for this purpose; furthermore, one of the four crimes described in and made punishable by Law No. 10[33] was "membership in categories of a criminal group or organization declared criminal by the International Military Tribunal."[34]

The third purpose of Law No. 10—the establishment of a uniform legal basis for war crimes trials throughout the four zones—was imperfectly achieved. As will be seen, in the American and French zones there were systematic and mutual harmonious programs for carrying the law into effect. But in the British zone, all major war crimes trials were held before strictly military courts established

[31] Control Council Law No. 10, Art. III, pars. 4 to 6 inclusive, and Arts. IV and V.

[32] IMT Charter, Art. 10.

[33] Law No. 10, Art. II, par. 1.

[34] Law No. 10, Art. II, Par. 1(d). It appears to the writer that the draftsmen of J. C. S. 1023/10 intended to cover these "membership proceedings" by clause (4) of paragraph 3 thereof: "have been members of organizations or groups connected with the commission of such crimes" (*infra*, p. 245). But the draftsmen of Law No. 10 either overlooked this clause or took a different view of its meaning, since it was allowed to remain in paragraph 2 of Article II of Law No. 10 as one of the specified classes of indictable *connection with* any of the four crimes defined in Law 10, and subparagraph 1(d) was added to make membership (in IMT-convicted organizations) itself one of the four crimes.

under the Royal Warrant,[35] and the charges were limited to violations of the laws of war. I am without reliable information on the war crimes program in the Soviet zone, but have no reason to believe that any substantial steps toward the execution of law No. 10 were ever taken.

The definitions in Law No. 10 of the crimes which it made punishable were derived primarily from Mr. Justice Jackson's interim report *via* J. C. S. 1023/10, and secondarily from the London Agreement. The basic clauses of Law No. 10 defining "crimes against peace," "war crimes," and "crimes against humanity" were all substantially identical with the comparable clauses in the two primary antecedent documents, but the designating names were taken from the Charter, and in each case a subsidiary illustrative clause was added, starting with the words "including but not limited to"; the contents of these illustrative clauses were also adapted from the comparable definitions in the London Charter.

Thus the definitions in both the Charter and Law No. 10 had a common origin in Mr. Justice Jackson's interim report.[36] But when the definitions took final shape in these two documents there were certain notable differences between them. For example, the definition of "crimes against peace" in Law No. 10 preserved the word "invasions" which had been utilized in Mr. Justice Jackson's interim report and in J. C. S. 1023/10; but this word was dropped in the London Charter definition. The Charter made punishable as "crimes against humanity" only such atrocities and offenses as were committed "in execution of or in connection with any crime within the jurisdiction of the Tribunal"; whatever may have been the intended meaning of this qualifying phrase, it was abandoned in Law No. 10.

When Law No. 10 was enacted, the London Charter had already been in effect four and one-half months, and the first Nuernberg trial had been in process for a full month. The differences between the definitions of the Charter and Law No. 10 were patent, and one must presume that the Control Council was aware of them, and deliberately adopted definitions different from those of the Charter, intending the differences to be meaningful. But even this presumption—logical and in accord with accepted canons of construction as it was—was beclouded by other language in Article I of Law No. 10, providing that the London Agreement and Charter (as well as the Moscow Declaration) was an "integral part" of Law No. 10. This furnished a peg for the argument, subsequently advanced by defense counsel, that Law

[35] *Supra*, p. 4, footnote 18. The Royal Warrant is submitted herewith as Appendix E.

[36] On 14 June 1945 the United States circulated a proposed draft of an agreement to the other three countries, and this draft was taken as the basis for discussion when the London Conference assembled on 26 June 1945. The definitions therein were clearly derived from Mr. Justice Jackson's interim report, and closely parallel those in J. C. S. 1023/10. *International Conference on Military Trials, op. cit., supra*, pp. 55–58.

No. 10 could not be construed in any respect more broadly than the Charter, despite substantial differences in wording.[37]

Another superficial but confusing point was raised at Nuernberg whenever attention was focussed on provisions of Law No. 10 which were more broadly worded than those of the Charter. International law, it was argued, could not have changed in the few months between 8 August 1945 (the date of the Charter) and 20 December 1945 (the date of Law No. 10). Therefore, if Law No. 10 was in any respect more broadly worded than the Charter, it was to that extent invalid under the principle *nullum crimen nulla poena sine lege* (analogous to the *ex post facto* clause of the Constitution). But this argument mistakes the nature of international law. The London Charter is not a statute; Law No. 10 may be a statute in Germany, but internationally it is no more a statute than is the Charter. In fact there are no international statutes, because there is no international sovereignty with legislative power. International law is, like the Anglo-Saxon common law, a system of *customary* law, to be determined from accepted international practice, and from treaties, declarations, learned texts, and other sources. Just as courts applying the common law may come to different conclusions about the scope of a common law principle, so international courts or congresses applying or stating international law in decisions or treaties may differ concerning the scope of a principle of international law. So it is in no way remarkable that the Charter and Law No. 10 are not identical. It would, in fact, be remarkable if they were identical, unless the sole intention of the latter was to copy the former. Nor is either intended to be a complete statement of the entire content of international penal law.[38] Law No. 10 can be held to violate the *ex post facto* principle, therefore, only if it is shown to transcend the bounds of international law as determined from all relevant sources, including actual practice and common acceptance. The London Charter is only one of many such sources, and it proves nothing to establish merely that in such or such a particlular it is more narrowly phrased than Law No. 10.

In numerous respects, Law No. 10 was far less detailed than the Charter. Law No. 10 did not itself establish any tribunals; it merely authorized the four zone commanders to establish "appropriate tribunals" in their respective zones. It did not attempt to prescribe the procedures to be used in war crimes trials; this, too, was left to the individual zone commanders. In the American zone, these matters

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[37] Several of the Nuernberg Tribunals gave some effect to this argument, which appears to me to traverse the elementary canons of construction that particular language will prevail over general, and that a document should be so construed as to give meaning to all its parts.

[38] For example, neither the Charter nor Law No. 10 expressly covers attempts to commit war crimes. Yet there appears to be little doubt that at least some such attempts are punishable. See Appendix B, *Nuremberg Trials: War Crimes and International Law*, *op. cit. supra*, p. 347.

were dealt with subsequently in Military Government Ordinance No. 7.[39]

Executive Order No. 9679

During the latter part of November and early December 1945, while the trial before the IMT was getting under way and the Allied Control Council (through its subordinate committees) was formulating Law No. 10, discussions were continued (among General Betts, Colonel Fairman, Mr. Fahy, and myself) looking to the establishment of an organization to carry out the trials in the American zone envisaged by J. C. S. 1023/10 (and subsequently by Law No. 10). At a meeting in Frankfort on 3 December 1945 (attended by Lt. Gen. Bedell Smith as Chief of Staff of USFET, General Betts, and myself) these talks culminated in concrete written recommendations. These were embodied in an exchange of letters (dated respectively 1, 4, and 5 December 1945) between Mr. Justice Jackson and Lt. Gen. Bedell Smith, and were submitted to Washington in letters from the Justice to the President (4 December) and from USFET to the Chief of Staff, United States War Department (5 December). These documents are attached hereto as Appendix F. The highlights of the recommendations were—

(a) The Theater Judge Advocate would continue to be responsible for the trial of cases involving war crimes against United States nationals and atrocities committed in concentration camps overrun by United States troops;

(b) Mr. Justice Jackson's Nuernberg organization, the Office, Chief of Counsel for the Prosecution of Axis Criminality (OCCPAC), would constitute the "parent organization" in preparing for trials under Law No. 10;

(c) Mr. Justice Jackson would proceed to appoint a Deputy Chief of Counsel to "organize and plan" for such trials;

(d) Mr. Justice Jackson's successor as Chief of Counsel would be appointed by the Military Governor and would, as an official of OMGUS, report directly to the Deputy Military Governor (then Lieutenant General Lucius D. Clay); and

(e) Executive Order No. 9547 (of 2 May 1945), under which Mr. Justice Jackson had been appointed, would be amended so as to cover these plans.

Soon thereafter Brigadier General Betts proceeded to Washington to present these recommendations to the appropriate authorities. They met with general approval, and on 16 January 1946 President Truman signed Executive Order No. 9679 (attached hereto as Appendix G), embodying the proposals described above.

[39] *Infra*, pp. 28–32.

Up to and including 7 January 1946 I was fully occupied with the preparation and presentation of that portion (involving chiefly the High Command of the German Armed Forces) of the case before the IMT assigned to me by Mr. Justice Jackson. Consequently, my participation in the discussions and plans culminating in Executive Order No. 9679 was very occasional and purely consultative. When I was finally able to survey the situation in Nuernberg with respect to preparing for future trials under Law No. 10, it speedily appeared that only a very few members of the prosecution staff—including less than one-half dozen lawyers—were interested in remaining in Germany for this purpose. On 30 January 1946 I reported to Mr. Justice Jackson:

> It will be quite impossible to conduct the subsequent proceedings with the present legal staff of the Office, Chief of Counsel. Indeed, it will even be impossible to form the bare nucleus of a staff for further proceedings from the personnel now in Nuernberg. This is so for two reasons:
>
> (a) With practically no exceptions the present staff has absolutely no interest in participating in further proceedings. The reasons for this are by now irrelevant; the fact is that almost without exception, the lawyers now in Nuernberg want to finish their work here as quickly as possible and get home.
>
> (b) The legal staff has already diminished to such a point that there is no substantial personnel which can be diverted from work on the present trial to work on subsequent proceedings * * *.
>
> Accordingly, the necessary legal talent to handle further proceedings must be recruited anew.

As a result, I simultaneously recommended to Mr. Justice Jackson "that the United States enter into no commitments whatsoever for any further trials of war criminals until we can ascertain that staff will be available to handle same" and "that no announcement concerning the creation of any section * * * of your staff to deal with further proceedings be made [40] until we are sure that we are in a position to move forward."

After further discussions with Mr. Justice Jackson, General Betts, Mr. Fahy, and others, I returned to the United States (late in February) for the purpose of recruiting a staff. This proved a difficult undertaking, but by the end of March 1946 some 35 attorneys had been engaged and, while this was by no means a large enough group considering the scope of the undertaking, it was a reasonably adequate nucleus. In the meantime various other problems had been settled, and on 29 March 1946 Mr. Justice Jackson announced my appointment by him as Deputy Chief of Counsel, and directed me to prepare for the prosecution of war crimes charges other than those involved in

[40] On 12 January 1946, by General Memorandum No. 13, Mr. Justice Jackson had established within his organization a "Subsequent Proceedings Division," but this action was not publicized. Prior to my designation as Deputy Chief of Counsel, this Division was headed by Capt. Drexel A. Sprecher.

the IMT trial.[41] I remained in Washington a few more weeks to continue recruitment, and returned to Nuernberg at the end of April 1946.

[41] The appointment was effectuated by General Memorandum No. 15, 29 March 1946, attached hereto as Appendix H. This document also transferred to my control the Subsequent Proceedings Division which had been established by General Memorandum No. 13.

THE "SUBSEQUENT PROCEEDINGS DIVISION" OF OCCPAC

The first Nuernberg trial before the IMT did not end until 1 October 1946. On 11 October the sentences were confirmed by the Allied Control Council, and the death sentences were executed on 16 October. Mr. Justice Jackson resigned as Chief of Counsel on 17 October, and I was appointed as such by General McNarney (the Military Governor) on 24 October. Simultaneously, the Office, Chief of Counsel for War Crimes (OCCWC) was established as a division of the Office of Military Government, U. S. (OMGUS).

Up to 24 October 1946, accordingly, preparation for the American zone trials under Law No. 10 was the task of the "Subsequent Proceedings Division" of Mr. Justice Jackson's organization (OCCPAC). On and after 29 March [42] this division was headed by me, and as Deputy Chief of Counsel, I was subordinate and accountable to Mr. Justice Jackson (who in turn reported directly to the President), and not to OMGUS or the War Department.

In the meantime, the War Department had reorganized its war crimes establishment. Over-all support and coordination of the war crimes activities (such as the Dachau trials) conducted by the Theater Judge Advocates had been furnished by the War Crimes Office established late in 1944 in the Office of the Judge Advocate General of the Army.[43] A Washington branch office of Mr. Justice Jackson's staff (OCCPAC) had been set up under the Assistant Secretary of War (OASW) in May 1945.

On 4 March 1946, by order of the Secretary of War (Mr. Patterson),[44] the War Crimes Office of the JAG was transferred to the Civil Affairs Division. The same order directed that, at such future time as the Chief of Counsel for War Crimes should become an official of OMGUS (as envisaged by Executive Order No. 9679), the Chief of Counsel's Washington branch (then in the OASW) should also be transferred to the Civil Affairs Division. The Assistant Secretary of War (Mr. Howard Petersen) was to continue to act as the Secretary's representative in all matters involving war crimes.

In pursuance of this order, a War Crimes Branch, under the direction of Colonel David Marcus, was established in the Civil Affairs

[42] As a practical operating matter, the Division was under Captain Sprecher's direction until my return to Nuernberg at the end of April.

[43] See *supra*, p. 2 and footnote 9.

[44] WDCSA 000.5 (27 February 46) issued 4 March 1946. This order also terminated the supervisory functions of the Assistant Chief of Staff, G–1, in the field of war crimes.

Division of the War Department. The War Crimes Branch (to the activities of which Mr. Howard Petersen gave constant personal attention and consistent and effective support) furnished the administrative machinery for employing the attorneys and other staff members engaged by me, and carried on the recruiting process after my return to Nuernberg. Later, under the direction of Colonel Edward H. Young, the War Crimes Branch continued to support the Nuernberg war crimes agencies, including the defense, with the greatest efficiency.

Accordingly, while my own subordination to Mr. Justice Jackson was clear and direct, the task of the Subsequent Proceedings Division was one in which numerous other agencies were directly interested. The War Department, through the Assistant Secretary of War and the War Crimes Branch of the Civil Affairs Division, was vitally interested as the prospective focus of full authority in the war crimes field upon Mr. Justice Jackson's resignation. It was also responsible for stateside recruitment of personnel. In Germany, OMGUS was the prospective heir of administrative and policy control of the Nuernberg trials, and USFET would remain responsible for logistic support. No decision had as yet been made with respect to holding a second trial under the London Charter before a quadripartite bench, and in this and other respects the State Department was deeply concerned. In discharging the responsibility assigned to me by Mr. Justice Jackson of "organizing and planning the prosecution of atrocities and war crimes other than those now being prosecuted * * * in the International Military Tribunal," the views and policies of all these other agencies had to be taken into full account.

Staff Recruitment and Organization

The initial group (consisting of some 25 attorneys) of staff members recruited stateside by me arrived in Nuernberg during the second week of May 1946. A few more individuals were available from Justice Jackson's staff, and, with the arrival of more stateside recruits during May and June, the Subsequent Proceedings Division numbered 113 by 4 July 1946. By the end of October, when the Division became the Office, Chief of Counsel for War Crimes (OCCWC) of OMGUS, its strength was over 400 American and Allied employees.

The task which the Division faced was enormous and complex, and the recruitment problem was correspondingly difficult. To be sure, lawyers were required to prepare and try the cases, but the legal staff was only one of many facets of the staff problem. Most of the documentary evidence was German, so that the attorneys (unless they happened to understand that language) were helpless unless assisted by analysts and research workers who were qualified, both linguistically and by general education and intelligence, to screen extensive files and other large collections of documents and select such as were or might

be relevant evidence. Most of the prospective witnesses were non-English-speaking Europeans, so that pretrial interrogations had to be conducted through interpreters or by skilled, linguistically qualified interrogators. Documents and testimony alike needed to be accurately translated for the judges. Many copies of the documents and the transcripts of testimony were necessary for the judges, prosecution and defense counsel, defendants, witnesses, and others. Court reporters were needed to record the proceedings (both in English and German). The requirements for administrative and clerical personnel were extensive. All these present and future needs had to be estimated as accurately as possible, tables of organization prepared, and recruitment set in motion, in order that the trials under Law No. 10 might be begun as soon as possible after the conclusion of the IMT trial.

The legal staff of the Division was divided into five groups or "trial teams." Three of these concerned themselves with preparing for the trial of cases involving, respectively, military leaders, SS and police officials, and diplomats and other high government functionaries. The fourth group undertook the analysis and preparation for trial use of evidence concerning the top officials of the Krupp concern and the I. G. Farben chemicals combine. The fifth legal team was charged with making a general study of the structure of German industry and finance, in order to determine the impact of nazism on the German business community, and the part played by that community in the development and conquests of the Third Reich dictatorship.

A small but important nonlegal branch undertook to compile a general register of leading German personalities in all walks of life under the Third Reich. This unit also built up a locator file showing the place of confinement or other whereabouts of prominent persons and war crimes suspects and witnesses, and made the arrangements for bringing such persons to Nuernberg for trial or interrogation. Another important unit was established to handle interrogations, register and file documents, supervise the library, document room, etc.

Up to the time of Justice Jackson's resignation, general administration of this staff was handled by OCCPAC, of which the Division was a part. However, a small administrative staff was set up under the Executive Officer of the Division (Col. Clarence M. Tomlinson), which took over from Mr. Justice Jackson's administrative staff (headed by Brig. Gen. Robert J. Gill) when OCCWC came into existence.

Operations

By the time of my return to Nuernberg at the end of April 1946, the general scope of the trials to be held in the American zone under Law No. 10 had been roughly determined, at least unofficially. The basic problem was how extensive a program of prosecutions should be mapped out, and "how far down the scale of Nazi criminality our

prosecutions are to be carried." [45] Closely related to and indeed a part of this matter was the question of how to handle the prosecution of the members of such groups or organizations as might be declared criminal by the IMT in the first Nuernberg trial. This, in turn, could not be determined independently of the "denazification program" then being developed by OMGUS and the governments of the three "Laender" (Bavaria, Wuerttemberg-Baden, and Greater Hesse) in the American zone, and could not be finally settled until the precise terms of the IMT's declarations of criminality (if any) became available.

In January 1946, Mr. Charles Fahy (then the Director of the Legal Division of OMGUS) made available to me a proposed report of the De-Nazification Policy Board of OMGUS [46] which pointed out that—

> * * * the Control Council law * * * provides that membership in a group or organization declared criminal by the International Military Tribunal is, in and of itself, a crime. The organizations indicted before the International Military Tribunal include the whole Leadership Corps of the Nazi Party (about 700,000 persons), all branches of the SS (about 250,000 to 300,000 persons), the SD (about 15,000 persons), the Gestapo (about 15,000 persons), and the SA (about 1,500,000 to 2,000,000 persons). While there is undoubtedly considerable overlapping in these figures, it may be conservatively estimated that not less than 2,000,000 persons in all of Germany (and probably not less than 500,000 persons in the U. S. zone) will be war criminals under the proposed Control Council law if the organizations under indictment at Nuernberg are declared criminal * * *.
>
> The Chief of Counsel and his staff obviously cannot prosecute all of the Germans declared to be criminal under the proposed Control Council law. Such prosecutions by the Chief of Counsel must be limited, at the outside, to several thousand of the major war criminals. All of the remaining individuals within the terms of the proposed Control Council law must, for practical reasons, be handled by German agencies. This procedure, in any event, seems desirable in order to ensure maximum German participation in the program.
>
> The De-Nazification Boards provided for in the recommended program appear to be the most desirable German tribunals to dispose of those persons whom the Chief of Counsel determines not to prosecute himself.

These observations seemed to me generally sound, and on 30 January 1946 I suggested to Mr. Justice Jackson that "the vast majority of the so-called 'organizational cases' must be handled under the denazification program." Had the IMT been disposed to make a blanket and categorical finding of criminality as to the indicted organizations, there might have been room for two views on this question, [47] but the declaration ultimately made applied only to those members who knew of or participated in the criminal activities of the organization. This ruling opened up issues of fact and, together with the necessity of

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[45] See paragraph 6 of the letter of 5 December 1945 from USFET to the Chief of Staff of the War Department, *infra*, p. 266.

[46] Dated 20 December 1945 and prepared under the direction of Lt. Col. Robert R. Bowie, Executive Secretary of the Board.

[47] In his reply of 5 February 1946 to my proposal, Mr. Justice Jackson suggested that the membership cases could "be dealt with in very rapid fashion and, perhaps, in substantial groups."

determining comparative degrees of guilt as the basis for sentencing, eliminated all possibility (in view of the large number of members of these organizations) of trying any substantial portion of them before American tribunals, at Nuernberg or elsewhere.

At all events, my views in this regard were informally approved by OMGUS, and on 6 April 1946 I recommended to the Assistant Secretary of War (Mr. Petersen) that, while "no final plans for the disposition of the 'membership cases' can be made until the International Military Tribunal has rendered its decisions," nevertheless "it is envisaged that the bulk of the * * * membership cases can be handled within the scope of the denazification program now being put under way by OMGUS." The work of the Subsequent Proceedings Division was planned by me on this basis, and the terms of the IMT judgment eventually clinched the matter. No effort was made to handle the "membership cases" as such in the trials under Law No. 10; these were to be dealt with by the denazification "Spruchkammern." Defendants selected for trial on other charges who happened to be members of an organization declared criminal by the IMT were additionally charged with the crime of membership therein, but no one was ever charged at Nuernberg with the crime of membership alone.[48]

No attempt was made, during the life of the Subsequent Proceedings Division, to determine the total number of defendants to be tried. In my early recommendations to Mr. Justice Jackson and Mr. Petersen, prior to any real study of the problem, I had estimated the probable number of major culprits in the neighborhood of 100. As I became increasingly familiar with the governmental, military, and economic structure of the Third Reich and with the documentary and other available evidence of criminality, my estimate was increased to between 200 and 500. Eventually, as it developed, 185 persons were indicted under Law No. 10; this figure, however, was not fixed arbitrarily, but came about in the light of the circumstances as they developed.

Within the over-all scope of the program as described above, seven preliminary tasks or problems confronted the Subsequent Proceedings Division. First and foremost was the actual procurement and evaluation of evidence, documentary and oral. The documentary evidence was scattered among a number of "captured document centers" and other repositories in Germany, the United States, and elsewhere. Many of the files in these document centers had been screened by Mr. Justice Jackson's staff in preparation for the first Nuernberg trial, but this work had been substantially abandoned several months before the creation of the Division. Branch offices of the Division were set up

[48] A few defendants acquitted of other charges were, however, convicted of membership alone.

in Berlin (where most of the SS and Foreign Office files were held), Frankfort (headquarters of I. G. Farben), and Washington (where the German Army documents were being assembled). Small teams of research analysts were sent to numerous less important document repositories.

In screening this great mass of documents, the research analysts worked under instructions from the attorneys, and as the latter grew more familiar with the subject matter and the evidence began to take shape, these instructions became more precise and the selection process more efficient and economical. Where necessary, German-speaking attorneys worked directly with the research analysts. Photostats of documents thought to have evidentiary value were assembled in the Document Room at Nuernberg under a rough system of classification by subject matter. Documents bearing on military affairs, for example, were given the symbol NOKW (the "N" standing for "Nuernberg" to distinguish them from those already collected for the first trial at London, Paris, and elsewhere, and "OKW" for "Oberkommando der Wehrmacht," the Supreme Headquarters of the German Armed Forces). Similarly, documents of the SS and other Nazi organizations were given the symbol "NO," and the Krupp and Farben documents and those of other industrial concerns the symbol "NI." Each document was given a number within each letter series when it was registered by the Document Room.

Second only to the documents as a source of evidence was the information furnished orally by German governmental, military, and business leaders and other individuals. A great deal of such information was already available from interrogations conducted shortly after the end of the war by intelligence teams and other units of the American and British armies and of various civilian agencies. Also available were a large number of interrogations conducted by Mr. Justice Jackson's staff in preparation for the first Nuernberg trial. Using these interrogations and the documentary evidence as a starting point, a systematic program for the questioning of leading Germans and other potential witnesses was embarked upon by the Division, as is described in detail hereinafter.[49]

As the documentary and oral evidence grew in volume and was "sorted out" by the lawyers and research analysts, it became possible for the Division to embark on the next task: the determination of what individuals should be accused, and of what they should be accused. The selection of defendants and preparation of the charges against them was, of course, one of the major tasks of the Division and of OCCWC thereafter, and will be separately and fully described.[50]

[49] See pp. 58–62, *infra.*
[50] See pp. 73–85, *infra.*

Only after it had been determined who to try in a particular case, and after the charges (based upon the available documentary and other evidence) had been drawn up was it possible to commence actual preparations for trial. Only one or two cases reached this stage during the life of the Subsequent Proceedings Division.

The fourth and rather special problem which confronted the Division was the possibility that there might be a second trial under the London Agreement before a quadripartite tribunal. This matter occupied a large share of my personal attention throughout most of 1946, and was not finally settled until near the end of that year. The course of negotiations on this subject among the four occupying powers and the policy considerations which led to the ultimate decision against holding any additional quadripartite trials, are summarized below.[51]

The fifth and a very major task was to develop a plan for the establishment of tribunals to hear the cases brought under Law No. 10. Unlike the London Charter (which contained numerous provisions establishing the International Military Tribunal, setting forth its jurisdiction, and outlining its procedure), Law No. 10 was entirely general with respect to the nature of the Tribunals which would judicially enforce its provisions; it stated only that persons accused under Law No. 10 should be brought to trial "before an appropriate tribunal," and left it to each zone commander individually to determine the nature of the tribunals and "the rules and procedure thereof." [52] In consultation with the Legal Division of OMGUS, the Subsequent Proceedings Division undertook to formulate a military government "ordinance" (subsequently promulgated by the Military Governor as Ordinance No. 7) setting forth the general structure of the Nuernberg tribunals, prescribing the qualifications of the judges, and providing for the Secretary General as the executive and administrative agent of the tribunals.[53]

Courts have to sit in courtrooms, and require numerous other physical facilities, particularly when most of the evidence is likely to be presented in a foreign language. Almost until the end of 1946, the problem of planning for the physical requirements of the tribunals was complicated by the possibility that additional quadripartite trials might be held under the London Charter. The Palace of Justice at Nuernberg had proved large enough for the IMT and the prosecuting staffs of the four nations, but there was little if any room to spare. Consequently, should the Palace of Justice continue to be thus occupied for a second quadripartite trial, the trials under Law No. 10 would have to be held elsewhere. Considerable time and energy was spent

[51] See pp. 22–27, *infra*.
[52] Control Council Law No. 10, Art. III, pars. 1 and 2.
[53] See pp. 28–32, *infra*.

investigating the feasibility of holding trials in other buildings in Nuernberg, and in other cities in the American zone of occupation. Toward the end of 1946, as the possibility of a second quadripartite trial grew increasingly remote and finally disappeared, the necessity for these projects was eliminated. Other rooms in the Palace of Justice proved adaptable as courtrooms, and five new courtrooms were ultimately constructed. The International Business Machine Company provided, on a loan basis, sufficient electrical equipment so that all five of these courtrooms (as well as the main courtroom in which the IMT had been sitting) could be furnished with the simultaneous interpretation system which had proved such a success in the first Nuernberg trial.

Finally, the Subsequent Proceedings Division had to envisage its own future size and shape as OCCWC and provide for its future logistic support. As the evidence was accumulated and assimilated, the number and general outline of the cases to be tried could be foreseen with ever-increasing accuracy. On the basis of the best forecasts that could be made, the Division drew up its estimates and tables of organization and submitted them to the occupation authorities.[54] These estimates, however, covered only the personnel to be employed in the actual carrying out of the trials, and this was only the beginning of the over-all "housekeeping" problem. Guards, cooks, and others were required for the jail where the accused were confined. Transportation was urgently needed for a great variety of purposes. Billets and messing facilities had to be made available. Mimeograph and photostating machines, typewriters, paper, and a large amount of other equipment had to be procured. These requirements were met by arrangements worked out with Brigadier General Leroy H. Watson, then Commandant of the Nuernberg-Fuerth Enclave and subsequently Commander of the Nuernberg Military Post, whereby the Post assumed responsibility for over-all logistic support of OCCWC and the Tribunals.

Throughout the period of its existence the Subsequent Proceedings Division operated under certain obvious handicaps, which arose inevitably out of the surrounding circumstances. It was extremely difficult, for example, to make any but the most general plans for the selection of defendants or the drawing up of charges until the IMT's judgment had been handed down. That judgment, while not in all respects binding on tribunals established under Law No. 10, was certain to be an extremely weighty precedent, and one had to anticipate (as indeed proved to be the case) that the IMT would determine or comment upon numerous basic legal questions which would also arise before the Law No. 10 tribunals.

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[54] The Subsequent Procedings Division submitted such estimates to USFET at Frankfort. The OCCWC, being a Division of Military Government, submitted them to OMGUS.

This period of uncertainty lasted five months—far longer than had been anticipated—inasmuch as the IMT judgment was not concluded until 1 October 1946. Throughout these months, quite naturally and properly, the Subsequent Proceedings Division occupied a very inconspicuous place in the scheme of things at Nuernberg. It was necessary above all that the IMT trial be concluded successfully and expeditiously, and Mr. Justice Jackson quite rightly gave priority—for recruitment of personnel, allocation of working facilities, etc.—to this primary mission.[55] Some members of the Division who had been in Nuernberg since the outset, including myself, still had commitments in connection with the IMT trial, and were unable to give undivided attention to the work of the Division until the first trial was concluded. A few others, who had come from the United States to join the Division in May, became discouraged by the long wait for the conclusion of the IMT trial, and went home in October or November 1946 when OCCWC was just getting under way.

Despite these obstacles, considerable progress was made by the Division. The general outlines of the program of trials under Law No. 10 began to emerge. Plans were laid for the composition and workings of the Tribunals in the form of a Military Government Ordinance (No. 7) which was ready for promulgation upon the conclusion of the IMT trial. Preparations for trial of a number of cases were commenced, and one large and important case was made ready for actual presentation before a tribunal. The day after the formal creation of OCCWC, the indictment was filed in this first case under Law No. 10—the so-called "Medical Case," formerly titled *United States* v. *Karl Brandt, et al.*

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[55] See General Memorandum No. 15, par. 2, *infra*, p. 268.

A SECOND TRIAL UNDER THE LONDON CHARTER?

As indicated above, an uncertainty which hung over the Subsequent Proceedings Division throughout its existence was the question whether there would be additional trials under the London Charter before a quadripartite bench. The Charter gave the IMT the character of a semipermanent body, and envisaged that a series of trials under its aegis might be held. Designation of the defendants to be tried was a function of the four Chief Prosecutors, acting as a Committee.[56]

The proposition of a second quadripartite trial first arose a few weeks before the beginning of the first trial, in connection with the case of Gustav Krupp von Bohlen und Halbach, who had been named in the indictment as a defendant therein. The officer of the IMT [57] who undertook to serve the indictment upon Gustav Krupp von Bohlen und Halbach discovered that his mental and physical condition was such as to render highly unlikely the possibility of his ever standing trial, and subsequent medical examinations disclosed that he was indeed entirely incompetent. His attorney [58] thereupon (4 November) filed a motion before the IMT requesting "that the proceedings against this accused be deferred" and "that the accused be not tried in his absence." [59]

Thereafter, on 12 November, Mr. Justice Jackson as Chief of Counsel for the United States filed his answer, opposing the application on behalf of Gustav Krupp, and requesting that Krupp be tried *in absentia* or in the alternative that his son, Alfried Krupp von Bohlen, be designated as an additional defendant in the case. The same day the British Chief Prosecutor (Sir Hartley Shawcross) filed a memorandum urging that Gustav Krupp be tried *in absentia*, but making no reference to the possibility of designating Alfried Krupp and stressing the desirability of opening the trial as then planned on 20 November, which would presumably have been impossible had Alfried Krupp been added as a defendant. The following day a motion was filed (by M. Charles Dubost) on behalf of the French Chief Prosecutor joining in Justice Jackson's suggestion that Alfried Krupp be named, but opposing the suggestion that Gustav Krupp be tried *in absentia*.

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[56] London Charter, Art. 14.

[57] Mr. James H. Rowe, Jr.

[58] Dr. Theodor Klefisch.

[59] By Art. 12 of the London Charter the IMT was authorized to proceed against an accused in his absence "if he has not been found or if the Tribunal, for any reason, finds it necessary, in the interests of justice, to conduct the hearing in his absence."

On 15 November the IMT granted the application of Gustav Krupp's counsel for a postponement of the proceedings, but directed "that the charges in the indictment against Gustav Krupp von Bohlen shall be retained upon the docket of the Tribunal for trial hereafter, if the physical and mental condition of the defendant should permit." This last clause of the Tribunal's order caused Justice Jackson to file a memorandum on the following day stating:

> * * * that the United States has not been, and is not by this order, committed to participate in any subsequent Four Power trial. It reserves freedom to determine that question after the capacity to handle one trial under difficult conditions has been tested.

And on the same day (16 November) the Committee of Chief Prosecutors filed a formal motion before the IMT asking that the indictment be amended by adding the name of Alfried Krupp von Bohlen as a defendant; this motion was signed by the representatives of the United States, France, and the Soviet Union, but not by the British Chief Prosecutor. It was denied by the Tribunal on the following day.[60]

The sequence of motions and rulings described above left matters in a situation which was quite unsatisfactory to at least several of the participants. As Justice Jackson put it in his answer to Krupp's original motion,[61] "it has at all times been the position of the United States that the great industrialists of Germany were guilty of the crimes charged in this Indictment quite as much as its politicians, diplomats, and soldiers." Extensive evidence was already available in Nuernberg tending to implicate Krupp and other prominent industrialists in the atrocious program for the employment in Germany of enslaved laborers, imported from the German-occupied countries. Postponement of the proceedings against Gustav Krupp, coupled with the failure of the motion to add Alfried Krupp to the dock, meant that the IMT trial would include none of these industrialists upon whose conduct the available evidence cast such grave suspicion. The situation was especially unpalatable to the French (who had ample warrant for distrusting the Krupp institution, where many Frenchman had been forced to work), and was perhaps especially embarrassing to the British, who had not joined in the motion to add Alfried Krupp to the dock. At all events on 20 November the representatives of Britain and France published a declaration reciting that:[62]

> * * * the French and British Delegations are now engaged in the examination of the cases of other leading German industrialists, as well as certain other major war criminals, with a view to their attachment with Alfried Krupp, in an indictment to be presented at a subsequent trial.

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[60] The motions and memoranda referred to in connection with Gustav and Alfried Krupp are printed in *Trial of the Major War Criminals,* vol. I, Nuremberg 1947, pp. 118–147.

[61] *Op. cit. supra,* p. 137.

[62] *Op. cit. supra,* p. 147. This declaration was embodied in a memorandum filed with the IMT on the same day by the representative of France.

So the matter of a second London Charter trial rested until the spring of 1946. On 4 April a meeting of the Committee of Chief Prosecutors was held in Nuernberg at which Sir Hartley Shawcross (H. M. Attorney General and British Chief Prosecutor) again brought the matter up.[63] Sir Hartley himself was lukewarm, but pointed out that if a second trial were to take place "preparations must be started now." Speaking for the Soviet Union, General Rudenko "said that he was in favour of a second trial by the International Military Tribunal but a conclusion could not be reached until the finish of this trial was seen." M. Champetier de Ribes, the French Prosecutor, "said the French position remained the same and they were in favour of a second trial before the International Military Tribunal." Mr. Justice Jackson, too, adhered to his previous position that he could not commit the United States to a second trial until they had seen the result of this one. Accordingly, no final conclusion was reached, but the conferees agreed that the collection and analysis of evidence against a small group of industrialists should be begun "in collaboration between the four delegations by personnel specially detailed to prepare the ground work for the second trial."

A few days later (8 April), Mr. Justice Jackson informed the War Department that discussion of a second IMT trial was reviving; he expressed the view that a second trial would involve certain disadvantages, but recommended that preparations should commence so that, if another trial proved necessary, it could be completed rapidly. On 24 April the Secretary of War (Mr. Patterson) replied, stating on behalf of the State and War Departments that a second IMT trial would be "highly undesirable" but approving the Justice's recommendation that preparations for the eventuality should be made.

Upon my return to Nuernberg at the end of April, Mr. Justice Jackson appointed me as his representative to consult and cooperate with the other three prosecution delegations with respect to a second IMT trial, and instructed me in accordance with the communications exchanged between himself and the War Department.[64]

The representatives so appointed by the four chief prosecutors [65] met

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[63] The minutes of this meeting, insofar as they concern the question of a second trial, are attached hereto as Appendix I.

[64] Shortly thereafter (13 May 1946), Mr. Justice Jackson forwarded a memorandum to the President on this subject which set forth at some length his doubts concerning the advisability of a second London Charter trial and concluded: "While much may be said on both sides, the balance of my judgment at this time is against further international trials. It is not so strong that great insistence by other nations, refusal of which would create embarrassments in foreign relations, might not change it. But I see little to be gained, from our American point of view, and a good deal to be risked. At the present time I would not recommend United States participation in another trial."

[65] Messrs. Patrick Dean and Elwyn Jones were designated to represent the United Kingdom, M. Charles Dubost for France, and Maj. Gen. N. D. Zorya for the Soviet Union. Between the time of the first meeting (15 May) and the second (6 June) General Zorya died as the result of a bullet wound in the head, and thereafter the Soviet Union was represented by Col. Y. V. Pokrovsky, the Deputy Chief Prosecutor for the Soviet Union.

on three occasions between 15 May and 2 July 1946. Primarily, consideration was given to the selection of defendants. All four delegates agreed that, in the interests of an expeditious trial, the number of defendants should be held to a minimum, and not exceed six to eight, including Alfried Krupp, who had already been designated as a defendant by the Committee of Chief Prosecutors in November 1945. By the time of these meetings, evidence had become available deeply implicating the principal directors of the I. G. Farben chemicals combine in slave labor and other criminal activities, and American interest in exposing the full scope of Farben activities was acute as a result of revelations by a special Senate Committee headed by Senator Harley Kilgore. Consequently, I recommended the inclusion of at least two leading directors of I. G. Farben, suggesting Hermann Schmitz (Chairman of the "Vorstand," or Managing Board of Directors) and Georg von Schnitzler (a leading member of the "Vorstand" and chairman of its Commercial Committee). Mr. Elwyn Jones of the United Kingdom requested the inclusion of the well-known Cologne private banker, Kurt von Schroeder (at whose home Hitler and von Papen had reached the understanding which ultimately led to Hitler's designation by von Hindenburg as Chancellor), and M. Dubost of France proposed Hermann Roechling (the leading coal and steel magnate of the Saar). The representative of the Soviet Union reserved the right to suggest one or two additional names, but never did so. Consequently, the five names agreed upon for inclusion in a second London Charter trial, should one take place, were those of Alfried Krupp, Schmitz and Schnitzler of I. G. Farben, Roechling, and Schroeder.

The delegates also gave some consideration to the question of where the trial should be held, and which judge should preside. All agreed that the trial should be held in Germany, either in Nuernberg or Berlin. The British and French delegates strongly favored Nuernberg, in order to preserve its efficiency and "going concern value," which could be counted on to expedite the proceedings considerably. The Soviet delegate favored Berlin, and I took no position on the matter. As to the presidency of the Tribunal, I expressed the view that the first trial had proceeded with remarkable smoothness under a British judge, and that there would be great advantages in "leaving well enough alone" and continuing in that situation.

At the close of the third meeting (2 July), it was agreed that the Committee had developed the situation far enough to report back to the Chief Prosecutors. Since the United States had not yet decided whether or not to participate in a second London Charter trial, the entire problem was then referred from Nuernberg back to Washington. At Mr. Justice Jackson's request, I submitted a report (dated 29 July 1946) to the Secretary of War.[66] In this report I recommended that,

[66] This report is attached hereto as Appendix J.

in view of the attitude of the other three governments,[67] the United States should agree to participate in a second IMT trial with not more than six to eight defendants (including the five already agreed upon), and should make Nuernberg available as the seat of the trial. Mr. Justice Jackson returned to the United States at the end of July. He discussed the question with the Secretary of State (Mr. Byrnes) in Paris en route, and thereafter with Secretary of War Patterson and others in Washington. The War Department adhered to its view that a second London Charter trial was undesirable, but no official decision was made.

No further action was taken until after rendition of judgment by the IMT on 1 October 1946. Shortly thereafter Mr. Justice Jackson submitted his final report to President Truman [68] in which he stated: [69]

> * * * The most expeditious method of trial and the one that will cost the United States the least in money and in manpower is that each of the occupying powers assume responsibility for the trial within its own zone of the prisoners in its own custody. Most of these defendants can be charged with single and specific crimes which will not involve a repetition of the whole history of the Nazi conspiracy. The trials can be conducted in two languages instead of four, and since all of the judges in any one trial would be of a single legal system no time would be lost adjusting different systems of procedure.
>
> A four-power, four-language international trial is inevitably the slowest and most costly method of procedure. The chief purposes of this extraordinary and difficult method of trial have been largely accomplished, as I shall later point out.
>
> There is neither moral nor legal obligation on the United States to undertake another trial of this character. While the International Agreement makes provision for a second trial, minutes of the negotiations will show that I was at all times candid to the point of being blunt in telling the conference that the United States would expect one trial of the top criminals to suffice to document the war and to establish the principles for which we contended, and that we would make no commitment to engage in another.
>
> It has been suggested by some of our Allies that another international trial of industrialists be held. The United States proposed to try in the first trial not only Alfried Krupp, but several other industrialists and cartel officials. Our proposal was defeated by the unanimous vote of our three Allies. After indictment, when it appeared that the elder Krupp was too ill to be tried, the

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[67] The French Government consistently and emphatically urged that a second London Charter trial be held. The Soviet Government did not officially announce its view during the first two meetings of the Committee, but at the meeting of 2 July Colonel Pokrovsky stated that: "the Soviet Government has decided that the delegates here present should work on the second trial. The Soviet Government believes that the international character of the trial should be stressed." The British attitude was cautious, but on 25 July 1946 Sir Hartley Shawcross wrote to Mr. Justice Jackson stating that "the British are to some extent publicly committed to a second trial * * * in all the circumstances, therefore, I think that we should make as early a declaration as possible that we are prepared to participate in a second trial involving the five defendants whose names have been agreed, and I feel little doubt that the British Government will adopt this view." There were informal indications, however, that some members of the British Government did not share Sir Hartley's views.

[68] The report is dated 7 October, but was not released until 17 October 1946.

[69] *International Conference on Military Trials, op. cit. supra,* pp. 435–436.

United States immediately moved that Alfried Krupp be added as a defendant and tried for the crimes which he had committed as chief owner and president of the Krupp armament works. This was likewise defeated by the combined vote of all our Allies. * * * This is not recited in criticism of my associates * * *. However if they were unwilling to take the additional time necessary to try industrialists in this case, it does not create an obligation on the United States to assume the burdens of a second international trial.

The quickest and most satisfactory results will be obtained, in my opinion, from immediate commencement of our own cases according to plans which General Taylor has worked out in the event that such is your decision. Of course, appropriate notifications should be given to the nations associated with us in the first trial.

In acknowledging Mr. Justice Jackson's report and accepting his resignation as Chief of Counsel, President Truman noted the Justice's recommendations as set forth above, and observed that: "the recommendations which you make * * *, coming as they do out of your experience at Nuernberg, will be given careful consideration." No further official action was taken for several months thereafter. Toward the end of the year, however, the French government circulated a note to the United States, British, and Soviet Governments suggesting that the Committee of Prosecutors provided for in Article 14 of the London Charter "should reconvene as soon as possible" in order to give consideration to a second IMT trial.[70] The reply to the French request was contained in a note which the American Embassies in London, Moscow, and Paris were instructed to address to the British, Soviet, and French Foreign Offices.[71] This note stated, in conclusion:

It is the view of this Government that further trials of German war criminals can be more expeditiously held in national or occupation courts and that additional proceedings before the International Military Tribunal itself are not required. This Government accordingly believes that there is no occasion for the Committee of Chief Prosecutors established under Article 14 of the Charter to reconvene as suggested by the French Government.

So far as I am aware, after the delivery of this note no further serious consideration was given to the holding of a second trial under the London Charter. In the meantime, the program of trials at Nuernberg under Law No. 10 had gotten under way, and two such trials were actually in process.

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[70] General Order No. 301 Headquarters, USFET, dated 24 October 1946, under which I was appointed as Chief of Counsel for War Crimes, also stated that I should serve as Chief Prosecutor for the United States under the Charter of the International Military Tribunal. See p. 294, *infra*.

[71] The note is printed hereinafter as Appendix K.

MILITARY GOVERNMENT ORDINANCE NO. 7

An essential prerequisite to the initiation of any trials under Control Council Law No. 10 was the setting up of tribunals for this purpose. As noted above,[72] Law No. 10 did not undertake to specify the nature or procedures of the tribunals which would be charged with its practical application.

The first draft of a Military Government "regulation" or "ordinance," under which these tribunals would be constituted, was prepared in July 1946.[73] By the middle of August an improved draft was circulated to the War Crimes Branch of the Civil Affairs Division of the War Department and to OMGUS, but no attempt was made to write the final version until after the judgment of the IMT in October. The ordinance was promulgated by order of OMGUS effective 18 October 1946[74] (the day after Mr. Justice Jackson's resignation) as Military Government Ordinance No. 7.[75]

In the course of preparing this Ordinance, careful consideration was given to the question whether the judges of the Law No. 10 tribunals should be professional judges (or experienced lawyers qualified for judicial functions) or lay military officers (as in military courts martial, and as at the Dachau trials of German war criminals). I recommended the former course of action[76] for several reasons. Firstly, while the usual type of issues under the laws and customs of war (such as military courts martial are accustomed to deal with) would undoubtedly arise, the trials under Law No. 10 would also involve numerous other complicated issues of law and fact which could best be dealt with by professional jurists. Secondly, in trials of the scope and importance such as those under Law No. 10, it seemed to me desirable that the reasons for the Tribunals' decisions should be fully set forth in judicial opinions; military courts martial do not custom-

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[72] *Supra*, p. 19.

[73] The first draft was prepared by Miss Bessie Margolin, Assistant Solicitor of the Department of Labor, who had been temporarily "loaned" to Nuernberg by that Department. The draft was reviewed and revised under my supervision by Miss Margolin and other senior lawyers of the Subsequent Proceedings Division, and completed in collaboration with the Legal Division of OMGUS, then headed by Mr. Alvin Rockwell.

[74] It was not published, however, until 24 October 1946.

[75] Attached hereto as Appendix L.

[76] My conclusion was reached after consultation wth Mr. Alvin Rockwell (Director of OMGUS Legal Division) and Colonel C. B. Mickelwait (who had become Theater Judge Advocate after the death of Brigadier General Betts in May 1946).

arily render opinions.[77] Thirdly, excellent as the work of military courts martial usually is, it seems to me that judgments by professional, civilian judges would command more prestige both within Germany and abroad, in the legal profession and with the general public alike. Fourthly, in any event it would have been extremely difficult to procure enough senior military officers to furnish the necessary number of judges for the Nuernberg tribunals.[78]

Because of these considerations, Ordinance No. 7 provided (Art. IIb) that the members of the Tribunals should "be lawyers who have been admitted to practice, for at least five years, in the highest courts of one of the United States or * * * in the United States Supreme Court."[79] Each tribunal was to consist of three members, and an alternate member (similarly qualified) might also be designated "if deemed advisable by the Military Governor."

Ordinance No. 7 also envisaged the possibility that under certain circumstances it might be desirable to establish tribunals jointly with one or more of the other occupying powers. To this end, it was provided (Art. IIc) that, in the discretion of the Military Governor, such joint tribunals might be set up, in which case their membership might include "properly qualified lawyers designated by the other member nations." For similar purposes, the Chief of Counsel was authorized (Art. IIIb) to "invite one or more United Nations to designate representatives to participate in the prosecution of any case." As matters worked out, no joint tribunals were ever constituted, but a representative of France participated (upon due invitation) in the prosecution of one of the more important Nuernberg cases.[80]

Another matter carefully considered during the drafting of Ordinance No. 7 was the qualifications of defense counsel. The London Charter did not cover this matter. The Rules of Procedure of the International Military Tribunal[81] provided that each defendant had the right either to conduct his own defense or to be represented by counsel. Lists of available counsel were furnished to the defendants, and each might either pick a counsel on the list, or ask for some other counsel, or allow the tribunal to designate counsel for him. Quali-

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[77] The London Agreement provided (Art. 26) that "the judgment of the Tribunal as to the guilt or innocence of any defendant shall give the reasons on which it is based, * * *" This requirement was carried into Ordinance No. 7 (Art. XV).

[78] The more important war crimes cases tried before military courts martial were usually heard by benches of seven or nine officers.

[79] This provision did not, of course, bar military officers from acting as judges if they could fulfill these professional qualifications. In fact, all judges of the Nuernberg tribunals established under Law No. 10 were civilians except one who, although a judge of the Court of Common Pleas of Pennsylvania, was also a captain in the United States Naval Reserve and came to Nuernberg on a duty assignment in that capacity (Capt. Michael A. Musmanno).

[80] The representative was M. Charles Gerthoffer, who participated in the prosecution of the so-called "Ministries case," officially designated *United States* v. *Ernst von Weizsaecker et al.* (Case No. 11).

[81] Adopted 29 October 1945, and printed in *Trial of the Major War Criminals, op. cit. supra*, Volume I, pp 19–23.

fications for defense counsel were not set forth in the Rules, and the IMT never, so far as I am informed, laid down any formal requirements. In actual practice, all counsel on the lists furnished to defendants were German, as it was felt that German counsel could more effectively represent the defendants than those of any other nationality.[82]

In drafting the clauses of Ordinance No. 7 governing defense counsel, heed was given to the practical experience of the IMT. German counsel were best equipped—both linguistically and by virtue of their professional and social training and contacts—to represent German defendants. They could deal much more expeditiously and understandingly with the evidentiary materials (both documents and witnesses) and could more easily apprehend the organization of German government and society and the channels of authority which were so important in establishing the true extent of individual responsibility. A group of 50 or more German attorneys had become thoroughly experienced in the procedures developed by the IMT, and many of them remained available to represent the defendants charged under Law No. 10. Accordingly, it was provided [83] that each defendant should "have the right to be represented by counsel of his own selection, provided such counsel shall be a person qualified under existing regulations to conduct cases before the courts of defendant's country * * *." However, the Nuernberg tribunals could also specially authorize "any other person" to act as defense counsel.[84] In case a defendant should fail or refuse to select counsel, the tribunals would appoint counsel to act in his behalf.

Likewise in the field of evidentiary rules, Ordinance No. 7 followed the precedent of the IMT. Nuernberg legal procedure, as outlined in the London Charter and Law No. 10 alike, was derived both from Anglo-Saxon common law and from continental law, and it was recognized that a slavish adherence to the evidentiary rules of either legal system alone would be out of keeping with the international character of the proceedings. To this end the London Charter provided (Art. 19) that the IMT should "not be bound by technical rules of evidence" but that it should admit "any evidence that it deems to have probative value" and should "adopt and apply * * * expeditious and non-technical procedure * * *." This broad directive was appropriate to a tribunal the members of which, rather than a lay jury, were themselves to pass on the issues of fact, and it laid the basis for the evolution of a procedure at once expeditious and fair to the defendants,

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[82] Only one defendant submitted a request for American counsel. He did not specify any particular individual, and the IMT rejected this application without prejudice to the defendant's right to ask for a particular American attorney.

[83] Art. IVc.

[84] Pursuant to this provision two American and one Swiss defense counsel were authorized. *Infra*, pp. 47–48.

as well as adaptable to the experience of both continental and common law practioners.

Ordinance No. 7 embodied identical language (Art. VII), and in addition specified that various types of documents—affidavits, depositions, diaries, etc.—should be admissible "if they appear to the tribunal to contain information of probative value relating to the charges * * *." Needless to say, however, the opposing party was to have full opportunity to contest the authenticity or probative value of such documents.

Between the IMT and the Law No. 10 tribunals there was no relationship of "superior" and "inferior." Rulings of the IMT on points of law were, of course, entitled to great weight as precedents, but were not binding on the subsequently-constituted Nuernberg tribunals. However, there was obviously no benefit to be derived from trying over and over again such general and fundamental questions of historical fact—unrelated to the personal responsibility of an individual defendant—as the aggressive character of Germany's wars against Poland, Norway, etc. Accordingly, Ordinance No. 7 provided (Art. X) that "The determinations of the International Military Tribunal in the judgments in Case No. 1 that invasions, aggressive acts, aggressive wars, crimes, atrocities or inhumane acts were planned or occurred, shall be binding on the tribunals established hereunder and shall not be questioned except insofar as the participation therein or knowledge thereof by any particular person may be concerned."

In addition to the tribunals themselves, Ordinance No. 7 also provided for the establishment of a Central Secretariat as the administrative and executive arm of the tribunals. The Secretariat was to be directed by a "Secretary General" who, although appointed by the Military Governor, would be subject to the supervision of and responsible to the judges of the tribunals.[85] In addition to handling routine administrative and supply requirements of the tribunals, the Secretary General was to discharge the usual responsibilities of a clerk of court, furnish the necessary clerical, reporting, and interpretative services, and act for the tribunals in procuring and facilitating the work of the defense counsel.

One matter overlooked in preparing Ordinance No. 7 was the contingency that the several tribunals established under Law No. 10 might render inconsistent rulings or judgments on important procedural or substantive questions of law. By the end of 1946 two tribunals were already in simultaneous session.[86] On 30 December I brought this matter to the attention of the presiding judges of the two tribunals and,

[85] Arts. XII, XIII, XIV. At such times as three or more tribunals were functioning, the Secretary General reported to the presiding judges of the several tribunals, who constituted a "supervisory committee."

[86] Military Tribunals I and II, which were hearing respectively the "Medical case" (Case No. 1) and the "Milch case" (Case No. 2).

with their advice and approval, an amendment to Ordinance No. 7 was prepared to cover this contingency. The amendment was submitted to the Deputy Military Governor (Lieutenant General Lucius D. Clay) on 6 January 1947, and was promulgated on 17 February 1947 as Military Government Ordinance No. 11.[87] It provided that a joint session of all the military tribunals constituted and functioning at any given time might be held to review conflicting or inconsistent rulings or judgments on important legal questions, and that decisions rendered in such joint sessions should thereafter be binding upon all tribunals. Where final judgments were thus reviewed they could, if necessary, be remanded to the individual tribunal for further action consistent with the joint decision.[88]

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[87] Attached hereto as Appendix M.

[88] Ordinance No. 11 also made two other minor changes in Ordinance No. 7. See Arts. I and III thereof, *infra*, pp. 292–293.

THE MILITARY TRIBUNALS, THE SECRETARY GENERAL, AND THE OFFICE, CHIEF OF COUNSEL FOR WAR CRIMES

On 24 October 1946, by order of the Military Governor (General McNarney), Mr. Justice Jackson's organization at Nuernberg (OCCPAC) became the Office, Chief of Counsel for War Crimes (OCCWC) and was established as a division of OMGUS.[89] Military Government Ordinance No. 7 was published on the same day. On the following day, the first of the Law No. 10 tribunals—Military Tribunal I—was constituted, and another order of even date appointed Mr. Charles E. Sands Secretary General. Also on 25 October, the first indictment under Law No. 10 was signed by me and filed with the Secretary General.[90] Thereafter the Nuernberg war crimes organization rapidly took shape.

The Nuernberg organization actually comprised four distinct units, engaged in a common enterprise but separately responsible directly to OMGUS. Although the IMT trial had been concluded, a portion of the Secretariat of the IMT, headed by the General Secretary (Col. John E. Ray) remained in Nuernberg in order to supervise publication of the proceedings of the IMT. As General Secretary, Colonel Ray was "operationally" responsible to all four of the powers that had constituted the IMT, and his staff included personnel supplied by the other three nations.[91]

The other three units were all concerned with the trials held under Law No. 10. The tribunals themselves—independent and responsible only to themselves in their judicial actions but administratively subordinate to OMGUS—constituted one of the units. The second was the Central Secretariat under the Secretary General, which existed only to serve and assist the tribunals but which, likewise, was administratively subordinate to OMGUS. The third was the Office, Chief of Counsel for War Crimes (OCCWC), directed by me as Chief of Counsel, with the mission of drawing the charges against the individuals who were to be tried, and presenting before the tribunals the case for the prosecution.

As Chief of Counsel, I reported directly to the Deputy Military Governor (then Lt. Gen. Lucius D. Clay) and, at General Clay's

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[89] General Orders No. 301, attached hereto as Appendix N. The same order contained my appointment as Chief of Counsel for War Crimes and as Chief Prosecutor for the United States under the Charter of the International Military Tribunal.

[90] This was the indictment in the "Medical Case."

[91] After 1946, however, the Soviet Union ceased to make personnel available.

request, I continued to report to him on all policy questions after his designation as Military Governor, although OCCWC remained officially subordinate to the Deputy Military Governor (Maj. Gen. Frank A. Keating and later Maj. Gen. George P. Hays). In addition, direct channels of communication between OCCWC and the War Department were authorized; recruitment of personnel and other assistance continued to be furnished by the War Crimes Branch of the Civil Affairs Division, and, so long as he remained in office as Assistant Secretary of War, Mr. Howard Petersen retained a close personal interest in the trials and gave invaluable advice and support.

Within the occupational administration, the two agencies most directly concerned with the Nuernberg trials were the Legal Division of OMGUS and the Office of the Theater Judge Advocate. The Director of the Legal Division of OMGUS (Mr. Alvin Rockwell) advised the Military Governor on all Nuernberg matters with which the Chief of Counsel was not, and could not appropriately be, concerned. These matters included the appointment of judges, the selection of presiding judges, the review of sentences imposed by the tribunals, and other purely judicial affairs. The Legal Division also participated in the drafting of Military Government Ordinance No. 7, and cooperated with the Nuernberg agencies in a variety of other important respects. Mr. Rockwell and his Division made a vital contribution to the success of the Nuernberg war crimes program. Since the Nuernberg agencies were a part of OMGUS rather than of USFET, the Theater Judge Advocate was less closely concerned. There was, however, constant and cordial cooperation between OCCWC and the War Crimes Branch of the Office of the Theater Judge Advocate.

At one time it was proposed that the logistic support of the Nuernberg trials should be provided by a special military detachment of OMGUS, but this plan was rejected in favor of arrangements worked out between the Commander of the Nuernberg Post (Brig. Gen. Leroy H. Watson) and myself whereby the Post undertook full responsibility for such support. The Post, in turn, reported through intermediate higher headquarters to HQ, USFET. Throughout his service as Commander of the Nuernberg Post, Brigadier General Watson gave consistent and effective support to the Nuernberg war crimes agencies.

The Military Tribunals

As stated above,[92] it was decided during the summer of 1946 that the Nuernberg benches should be composed of trained lawyers and, for the most part, professional judges. Immediately thereafter, efforts were begun by the War Department to "recruit" judges for

[92] *Supra*, pp. 28–29.

the Nuernberg trials.[93] The names of judges who were invited to serve were submitted to the Military Governor for advance approval.[94] Their actual appointment by the Military Governor was effected by the orders constituting the several tribunals. Ordinarily the judges arrived in Nuernberg by groups of three, so that each group comprised a tribunal. When they arrived in smaller or larger groups, the Military Governor (with the advice of the Director of the Legal Division) would determine which individuals should be appointed to particular tribunals, and would provide accordingly in his orders. These constituting orders also specified which of the judges should be the presiding judge.

In all, 32 individuals served as judges (or alternate judges) in the 12 Nuernberg trials held pursuant to Control Council Law No. 10. Five were appointed as alternate judges, and of these three later served as judges on tribunals subsequently constituted; accordingly, 30 individuals in all served as judges. Twenty-five were or had been State court judges; the others included a law school dean and prominent practicing attorneys. Of the 25 experienced judges, 14 had served on the highest court of a State, and the others in State intermediate appellate or trial courts. In the early stages of the Nuernberg trials several leading Federal judges accepted invitations to sit at Nuernberg, but Mr. Chief Justice Vinson shortly thereafter directed that no members of the Federal judiciary should serve there.

The first six Nuernberg tribunals were designated Military Tribunals I to VI in the order of the judges' arrival, and were constituted by orders issued between 25 October 1946 and 8 August 1947. These six tribunals tried the first seven Nuernberg cases.[95] The five remaining cases were tried before tribunals the membership of which included a few judges who had served in earlier trials, but which were composed for the most part of judges newly arrived in Nuernberg. For example, upon the conclusion of the "Medical case" (Case No. 1), two of the members and the alternate departed for the United States. The third member (Judge Crawford), together with two newly arrived judges, were reconstituted as Tribunal I and heard the "RuSHA case" (Case No. 8). Upon the conclusion of the court proceedings in the "Pohl case" (Case No. 4) before Tribunal II, one member and the alternate of that tribunal, together with the alternate from another court (Tribunal IV), were constituted as Tribunal IIA to hear the

[93] In this and other important phases of the war crimes program, the work of the War Department was furthered by the voluntary assistance of Mr. Charles A. Horsky, a leading Washington attorney who generously contributed much time and energy in support of the trials.

[94] In this field the Military Governor relied for advice on the Director of the Legal Division of OMGUS. Needless to say, OCCWC played no part in the "recruitment" process.

[95] Each of these tribunals tried one case except Tribunal II, which tried both the "Milch case" (Case No. 2) and the "Pohl case" (Case No. 4).

"Einsatz case" (Case No. 9). Upon rendition of judgment and adjournment *sine die* in the "Pohl case," the other two members of Tribunal II departed from Nuernberg, and Tribunal IIA was redesignated Tribunal II. Similarly, the Tribunals which heard the "Krupp," "Foreign Office," and "High Command" cases (Cases 10, 11, and 12, respectively) were initially designated as Tribunals IIIA, IVA, and VA but the "A" was dropped when the original tribunals III, IV, and V adjourned upon rendition of judgment.[96] Only two of the judges on these tribunals had served in earlier Nuernberg trials.[97]

After the first three tribunals had been constituted, the presiding judges thereof established (as authorized in Ordinances 7 and 11) a "supervisory committee of presiding judges," which thereafter assigned the cases among the several tribunals and acted for all the judges in various executive and administrative matters. Judge Toms (presiding judge of Tribunal II) served as chairman of this committee until his departure from Nuernberg in November 1947, when he was succeeded by Judge Shake, presiding judge of Tribunal VI.[98]

The Nuernberg military tribunals did a very impressive amount of work, In the twelve cases they held over 1,200 sessions, or approximately 100 sessions per case.[99] The "Milch case" required the fewest sessions (36) and the "Ministries case" the most (over 160). Slightly over one-third of the sessions (about 350) were consumed by the prosecution, and nearly two-thirds (860 sessions) by the defense. In addition, one joint session was held on 9 July 1947 of all the tribunals then constituted sitting *en banc*.[100] No doubt the final report of the Secre-

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[96] The "second editions" of Tribunals I to V were constituted by orders issued between 10 September and 24 December 1947.

[97] Judge Christianson, who presided in Case No. 11, had served as a member in the "Flick case" (Case No. 5) and Judge Harding, a member of the Tribunal which heard the "High Command case" had served first as alternate and later as a member of Tribunal III, which heard the "Justice case" (Case No. 3). Judge Harding was designated a member of Tribunal III when the presiding judge of that tribunal (Judge Marshall) was relieved because of ill health.

[98] Judge Shake served until the conclusion of the trial before his tribunal (the "Farben case") at the end of July 1948. Judgment in the "Krupp case" was rendered the following day, so that beginning 1 August 1948 there were only two tribunals functioning in Nuernberg and, pursuant to the provisions of Ordinance No. 7 (Art. XIII), the supervisory committe lapsed. Judge Christianson, however, thereafter acted as "Executive Presiding Judge" of the remaining Nuernberg judges.

[99] Inasmuch as 12 cases were heard by 11 courts, the average per tribunal was higher (approximately 110), and since 2 of the judges sat in 3 cases and several others in 2 cases, the average number of sessions per judge was still higher.

[100] The judges and alternates of Military Tribunals I, II, III, IV, and V sat in this joint session, as well as Judge Shake, whose Tribunal (VI) had not yet been constituted. This session was not held under the provisions of Ordinance No. 11 and did not result in a joint decision, inasmuch as no inconsistent rulings or judgments were at issue. The indictments in the cases then pending before Tribunals I, II, and III all contained a charge of conspiracy to commit war crimes and crimes against humanity, and in all three cases the defense had moved to dismiss this charge on the ground that such conspiracies were not made punishable by Control Council Law No. 10, but only conspiracy to commit crimes against peace. The joint session was called on the initiative of the tribunals, to enable all the judges to hear argument on this question. Thereafter, Tribunals I, II, and III acting individually issued identical orders dismissing the conspiracy charges.

tary General will contain much additional information with regard to the establishment and functioning of the Nuernberg Military Tribunals.

The Central Secretariat

The organization and activities of the Central Secretariat will be covered in the final report of the Secretary General, and will be sketched herein only sufficiently to facilitate understanding of the Nuernberg war crimes program as a whole. As stated above,[101] the Central Secretariat was originally established on 25 October 1946, at which time Mr. Charles E. Sands was designated Secretary General.[102] Mr. Sands held an important position in OMGUS at Berlin, and was made available only for temporary service as Secretary General at Nuernberg. He served, however, until the spring of 1947. On 18 April, he was succeeded by Col. John E. Ray, who served for over a year.[103] On 10 May 1948, Colonel Ray was reassigned; Dr. Howard H. Russell was appointed his successor, to serve until the dissolution of OCCWC and the Central Secretariat.

The more routine functions of the Central Secretariat were handled by its Administrative Branch, which was responsible for the receipt and distribution of documents, location of witnesses, and the procurement of court supplies. An Assistant Secretary General was assigned to each of the tribunals, to fulfill the usual functions of a clerk of court. Official records and files were maintained under the Secretary General's supervision in the Court Archives. The Marshal's Office, and the Legal Assistants to the judges were also part of the Central Secretariat.

The more difficult and unusual functions of the Central Secretariat involved the obtaining of defense counsel and the provision of facilities for use in their work. This was handled through the Defense Information Center, the chief of which (known as the Defense Administrator) reported directly to the Secretary General. The Defense Center rendered a wide range of services to defense counsel, as described more fully below [104] and in the final report of the Secretary General.

The Office, Chief of Counsel for War Crimes

Unlike the Military Tribunals and the Central Secretariat, the Office, Chief of Counsel for War Crimes (OCCWC) had been functioning, albeit under another name, prior to its official creation on 24 October 1946. Most of the legal and other professional members of OCCWC

[101] *Supra*, p. 33.
[102] General Orders No. 67, issued 25 October 1946.
[103] Colonel Ray also continued to act as General Secretary of the IMT Secretariat.
[104] *Infra*, p. 49.

had previously been members of the Subsequent Proceedings Division of OCCPAC.[105] A number of the administrative and clerical employees of OCCPAC also remained in Nuernberg for further employment with OCCWC.

Since OCCWC alone was a "going concern" at the time of the commencement of the program for trials under Law No. 10, it was obliged to undertake numerous functions which, under other circumstances might more logically have been discharged by the Central Secretariat. In this respect, too, there was a parallel to the experience of OCCPAC during the preceding year. Mr. Justice Jackson and his staff had arrived in Nuernberg months before the IMT was even constituted, and as a result almost the entire administrative burden of preparing for the trial fell on OCCPAC. The selection of a site for the trials, reconstruction of the Palace of Justice and redesigning of the main courtroom, arrangements for billeting, messing, and transportation, recruitment of interpreters, translators, court reporters, and secretaries—these and many other such matters were dealt with by Mr. Justice Jackson's administrative staff,[106] and continued to be so handled even after the arrival of the IMT. The IMT, to be sure, established its own Secretariat under a General Secretary [107] for the handling of purely judicial administrative matters, but the bulk of the general administration continued to be a function of OCCPAC.

Precisely the same situation confronted me at the time that OCCWC was established. Theoretically, court reporters and interpreters should have been procured under the supervision of the tribunals themselves acting through the Central Secretariat. But the first of the tribunals had arrived in Nuernberg only a few days previously and was quite unfamiliar with "local conditions," and the Secretary General had as yet no staff and was therefore in no position to cope with such problems. Accordingly, all translating work, the interpretation and recording of court proceedings, and the reproduction and distribution of documents, as well as general administrative matters for all Nuernberg personnel, had to be handled by OCCWC.

Because OCCWC was confronted with a constantly changing situation, as its work developed from the preparatory phases to the actual trial of cases and as the number of cases actually in process of trial increased (and, beginning in 1948, decreased), its organization was flexible and changed a good deal during the period of its existence. An organization chart constructed so as to emphasize the more permanent features of the organization is attached hereto as Appendix O.

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[105] Upon the creation of OCCWC, the Subsequent Proceedings Division as such was abolished.

[106] Mr. Justice Jackson entrusted the handing of these matters to his Executive Officer, Col. (later Brig. Gen.) Robert J. Gill.

[107] Brig. Gen. William L. Mitchell was the General Secretary from November 1945 to June 1946, at which time he was succeeded by Col. John E. Ray.

Despite this flexibility, the basic outlines of the organization remained unchanged throughout. The preparation of cases for trial and their actual presentation in court was handled by a number of legal "divisions" and "trial teams," each of which was concerned with a particular case or type of case. These "legal" divisions, together with the Evidence Division (described below), comprised the "professional" or "legal" segment of OCCWC. The other segment comprised the "administrative" or "service" divisions. These, which included the Administrative, Reproduction, Signal, and Language Divisions, were grouped under and responsible to the Executive Officer.[108]

During the first few months of OCCWC's existence, the various "legal" divisions were subordinated, both operationally and administratively, to the Deputy to the Chief Counsel.[109] Early in 1947, however, the position of Deputy to the Chief Counsel was abolished,[110] and from then on the heads of the several divisions were directly responsible to the Chief of Counsel. However, assignment of personnel among these divisions and coordination of various other semiadministrative matters were effected through a newly appointed officer with the title of "Executive Counsel." [111]

The actual trial work of OCCWC was, at the outset, divided among six divisions. The Military, Ministries, SS, and Economics Divisions prepared cases lying within the fields described by their respective titles. In addition, two special "trial teams" were set up to prepare the "I. G. Farben" and "Flick" cases for trial.

The SS Division[112] prepared and presented the "Medical," "Pohl," "RuSHA," and "Einsatz" cases (Cases 1, 4, 8, and 9, respectively). The Military Division[113] prepared and presented the "Milch case" (Case No. 2), and prepared and commenced the presentation of the "Hostage case" (Case No. 7). In the course of presentation of the "Hostage case," however, the head of the Military Division was obliged to resign on account of illness, and at that time (autumn 1947) the Military Division was merged with the SS Division. The new Military & SS Division completed the presentation of the

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[108] Up to the end of 1946 the Executive Officer was Col. Clarence L. Tomlinson. At the end of that year Colonel Tomlinson was reassigned; his successor was Lt. Col. Autrey J. Maroun. Colonel Maroun, in turn, was reassigned in October 1948. He was succeeded by Capt. Donald T. Paul, who remained as Executive Officer until the deactivation of OCCWC in 1949.

[109] Mr. Thomas E. Ervin.

[110] Mr. Ervin became one of the Deputy Chief Counsels and took charge of the presentation of the "Flick case" (Case No. 5).

[111] The position of Executive Counsel was filled in succession by Messrs. William F. Raugust, Benjamin B. Ferencz, and Alexander G. Hardy.

[112] Headed by Mr. James McHaney.

[113] Headed by Mr. Clark Denney.

"Hostage case," and prepared and presented the "High Command case" (Case No. 12).[114]

After final decisions were made with respect to what particular cases would be prepared and presented in the industrial and economic field, the Economics Division[115] was eliminated and its personnel allocated to divisions established for the trial of these particular cases. The trial teams originally established for the preparation of the "Flick" and "Farben" cases (Cases No. 5 and 6, respectively) continued in existence until the completion of those cases.[116] In addition, a third trial team was established which prepared and presented the "Krupp case" (Case No. 10),[117] and a fourth trial team[118] collected and analyzed the evidence with respect to the Dresdner Bank. The Ministries Division,[119] in the meantime, had been preparing evidence against government ministers and subordinate officials, including various officials of several economic ministries. Late in 1947 the Ministries Division was redesignated the "Political Ministries Division," and the members of the division who had been dealing with economic ministries were combined with the personnel of the Dresdner Bank trial team to form an "Economic Ministries Division."[120] These two divisions handled the presentation of the "Ministries case" (Case No. 11). Earlier in 1947, a trial team had been formed from personnel of the Ministries Division and placed under the direction of the Honorable Charles M. LaFollette for presentation of the "Justice case" (Case No. 3).

Supporting the work of all these Divisions and teams was the Evidence Division.[121] The most important subdivision of the Evidence Division was the Interrogation Branch, which throughout the life of OCCWC handled the greater part of the interrogation of witnesses and the pretrial interrogation of defendants, as is described in some detail below.[122] However, interrogation was by no means the only function of the Evidence Division. Another smaller but very important subdivision was the Apprehension and Locator Branch,[123] which ascertained the location of war crimes suspects and witnesses and maintained a cumulative card index locator file, and made ar-

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[114] After Mr. Denney's resignation, the "Hostage case" was handled by a special trial team (under Mr. Theodore F. Fenstermacher) which operated under Mr. McHaney's general supervision. When Mr. McHaney resigned as head of the Military & SS Division in May 1948, he was succeeded by Mr. Paul Niederman.

[115] Headed by Mr. Drexel A. Sprecher.

[116] Messrs. Josiah Dubois and Drexel A. Sprecher headed the "Farben" team and Messrs. Thomas E. Ervin and Charles Lyon the "Flick" team.

[117] Headed successively by Messrs. Russell Thayer, Joseph Kaufman, and Rawlings Ragland.

[118] Headed successively by Messrs. Foster Adams and Rawlings Ragland.

[119] Headed by Dr. Robert M. W. Kempner.

[120] Headed successively by Messrs. Rawlings Ragland, Charles Lyon, Russell Thayer, Charles Lyon, and Morris Amchan.

[121] Headed by Mr. Walter H. Rapp.

[122] *Infra*, pp. 58–62. See p. 60, footnote 172.

[123] Headed by Mrs. Thomas E. Ervin.

rangements on behalf of the prosecution for bringing suspects and witnesses to Nuernberg as needed for the preparation and presentation of cases. Equally important was the Document Control Branch,[124] which handled the safekeeping and registration of all documents brought to Nuernberg for evidentiary purposes, and assembled into "document books" particular groups of documents as specified by the lawyers for introduction into evidence in court. The OCCWC Library was also a part of the Evidence Division.

As final decisions were made on who were to be the defendants in the cases tried at Nuernberg under Law No. 10, it clearly appeared that there would be numerous individuals who, for one reason or another, could not be tried, but with respect to whom there was a greater or less amount of evidence which might be of an incriminating nature. At the same time, the denazification program was getting under way, and the German prosecutors frequently made application to OCCWC for such evidence as might be in our possession relative to defendants in particular denazification trials. About the middle of 1947 a new division—the Special Projects Division [125]—was set up to assemble evidence bearing on the guilt or innocence of individuals who were not to be tried by OCCWC but whose activities had come under scrutiny by the OCCWC staff. The evidence so assembled was then transmitted to the authorities under whose jurisdiction particular individuals were interned or confined,[126] or, upon request, was made available to German prosecutors attached to denazification tribunals.

Late in the summer of 1948, as the trials drew to a close, the Publications Division [127] was established to prepare the indictments, judgments, and other important portions of the records of the several cases for publication, both in English and in German. The Publications Division worked in close cooperation with the representative [128] designated by the Military Tribunals for purposes of publication of the proceedings. This task has not as yet been completed, and is discussed below.[129]

Under the Executive Officer were the four principal "service" divisions of OCCWC. Vitally important to the conduct of the trials but relatively simple in their structure were the Reproduction Division and the Signal Division. The former [130] handled all photostat, mimeograph and other reproduction of documentary material. This in-

[124] Headed by Mr. Fred Niebergall.

[125] Headed successively by Messrs. James E. Heath, Benjamin B. Ferencz, and Paul H. Gantt.

[126] For example, such matter was turned over to the British war crimes authorities in the case of individuals who were returned from Nuernberg to internment inclosures in the British zone of occupation.

[127] Headed by Mr. Drexel A. Sprecher.

[128] Mr. John H. E. Fried.

[129] *Infra*, pp. 100–102.

[130] The Reproduction Division was headed by Maj. Alexander G. Granzin.

cluded the transcript of the proceedings during the sessions of the tribunals, and all documents offered in evidence before the tribunals. The Reproduction Division also prepared charts, maps, and other displays needed for explanation or illustration of matters to be presented in court. The Signal Division,[131] in addition to routine communications responsibilities, installed and maintained the machinery and wiring for the simultaneous interpreting system employed in the courtrooms.

Basic administrative services were the responsibility of the Administrative Division.[132] Its main subdivisions were the Adjutant and Military Personnel Branch (cutting of orders, military personnel records, etc.), the Finance Branch, the Civilian Personnel Branch (personnel records, recruitment, employee relations, pay roll, etc.), the Fiscal, Budget, and Personnel Control Branch (preparation of budgets and tables of organization for submission to OMGUS), and the Liaison Branch (the channel for all requests to the Nuernberg Post for accommodations, supplies, and transportation).

The fourth and largest of the service divisions was the Language Division,[133] which was administratively responsible to the Executive Officer but reported directly to the Chief of Counsel on all policy matters. The task of this Branch was truly formidable, including as it did the translation into German of all English documents and into English of all German documents and into both German and English of documents in any other language, and the furnishing of all court interpreting services and of court reporting in both English and German. For these purposes, the Division was divided into the Translation, Interpretation, and Court Reporting Branches. For the most part, interpreters whose native tongue was English interpreted from German into English, and those whose native tongue was German interpreted from English into German, so that the interpreter spoke in his native tongue. In view of the complicated and often technical subject matter of the trials, the translators were broken down into groups who became especially familiar with military, medical, legal, or other particular terminologies.

Directly responsible to the Chief of Counsel was the Public Information Office.[134] The most important function of this office was to make available to newspaper correspondents the documents and other evidentiary material introduced during the trials, together with such explanatory matter as would assist the press in reporting the trials. The staff of half a dozen included a specialist in German press and radio, as well as a photographic section. The Office also rendered

[131] Headed by Maj. Kenneth Evans.
[132] Headed successively by Dr. Howard H. Russell and Capt. Donald T. Paul.
[133] Headed by Mr. Thomas K. Hodges.
[134] Originally known as the Public Relations Office.

general assistance to the press (particularly the German correspondents) on such matters as billeting, communications, etc.[135]

All but a very small fraction of the staff was permanently located in the Palace of Justice at Nuernberg. However, in view of the large collections of captured German documents in Berlin, as well as the constant need for liaison with OMGUS Headquarters, a Berlin Branch was established late in the summer of 1946.[136] The Berlin Branch comprised a number of research analysts who screened documents at the several document centers, and a smaller administrative section.[137] A smaller group was semipermanently located at Frankfort (I. G. Farben and other document files), and a representative of the office [138] was also stationed at Paris (procurement of witnesses, liaison with the French war crimes authorities, etc.) until the summer of 1947.

Civilians comprised the bulk of the staff of OCCWC throughout its existence. With the exception of myself, all the lawyers were civilians, as well as a great majority of the research analysts, linguists, reporters, etc. A small contingent of military personnel, however, comprised the staff of the Signal Division, and fulfilled several other administrative assignments. A number of the top administrative positions—the Secretary General, the Marshal of the Tribunals and the Assistant Marshals, the Executive Officer of OCCWC, and the heads of the Reproduction and Signal Divisions—were held (for all or part of the time) by officers. All military personnel were assigned, for purposes of discipline and administration, to the 7740th War Crimes Company.[139]

When OCCWC came into existence at the end of October 1946, it numbered something over 400 American and Allied employees. By the end of the year the entire staff numbered approximately 1,000, of whom almost exactly one-third were German and the balance (663) American and Allied (of whom 546 were civilians and 117 were Army officers and enlisted men). The staff continued to grow until the middle of 1947.

The months from May 1947 to January 1948 were the peak period.[140] On 1 August 1947 the American and Allied staff comprised just under 900 employees (780 civilians and 117 military), and the Germans numbered just under 800. Six weeks later (17 October) the non-German staff had dropped to 855, but the German staff had grown

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[135] The Public Relations Officers of OCCWC were successively, Messrs. John Anspacher, Peter Dreyer, Ernest Deane, and Eugene Phillips.

[136] Mr. Benjamin B. Ferencz and Lt. Col. William J. Wuest were successively chiefs of the Berlin Branch.

[137] At its peak, the Branch comprised about 40 American and Allied and 30 German employees.

[138] Lt. Col. Henry St. Leger.

[139] The 7740th War Crimes Company was billeted and messed by the Nuernberg Post. The Chief of Counsel (in his military capacity) or, in his absence, the ranking military officer in the Palace of Justice was in command of the Company.

[140] See Appendix P, *infra*, p. 296.

to 919, and the total of 1,774 was the highest during OCCWC's existence.

Early in 1948 the staff began to shrink, particularly in those categories (such as research analysts) which had been chiefly concerned with the preparatory phases of the trials; the number of lawyers also diminished, although four large trials were still in process up until the end of July, and the demands on the Language Division continued to be very heavy. By 2 July 1948 the organization was less than half its peak size (332 American and Allied and 429 German employees), and by 1 January 1949 the non-German employees were less than 20 percent as numerous as a year earlier (150 civilians and 9 military), and the entire staff, including the Germans (who numbered 248), had been cut to just 25 percent of its January 1948 size (407 in all).

All court proceedings had been concluded prior to this date (closing arguments in Case No. 11 having been finished about the middle of November 1948) and all but one of the judgments (the judgment in Case No. 11) had been delivered. Nevertheless, a few lawyers and research assistants had to be retained in Nuernberg to complete the final briefs in the last case, and a fairly large linguistic and clerical staff had to remain to handle the translation and reproduction of the final papers. By the time the judgment was finally rendered (14 April 1949), the staff had been cut to about 75 American and Allied employees and about double that number of Germans, of whom about one-third belonged to OCCWC and two-thirds to the Central Secretariat.[141]

It will be gathered from the foregoing figures that, during the period of its heaviest activity, the Nuernberg war crimes agencies, and in particular OCCWC, constituted a very sizable organization. It must not be concluded, however, that the prosecution's legal staff was correspondingly large. During the entire period of OCCWC's existence not over 100 prosecution lawyers were employed, and at any one time the number of prosecution attorneys was substantially less than that.[142]

The reason for the large number of employees was that at Nuernberg the "overhead" was inevitably very heavy, primarily but not exclusively because of the language problem. With the exception of those few attorneys who were fluent in German, all questioning of witnesses and suspects had to be carried on through interpreters or by specially trained German-speaking interrogators. All but a small fraction of the documentary evidence was in German, and had to be translated for the lawyers and judges who made use of it. Court proceedings

[141] In September 1948 the Language Division had been transferred from OCCWC to the Central Secretariat, and after that time the OCCWC was consistently and substantially smaller than the Secretariat.

[142] As will be seen, prosecution counsel were far outnumbered by defense counsel. *Infra*, pp. 46–49.

had to be carried on in two languages, requiring two sets of court reporters and the production in two languages of the transcript of proceedings. To meet the needs of judges, attorneys, defendants, witnesses, and others, numerous copies of all documents and transcripts had to be prepared by photostating or by mimeographing. In addition, the war crimes agencies were the only large unit of OMGUS in Nuernberg, and there was no other large unit within a hundred miles. Consequently, the war crimes organization had to be self-sustaining in many respects, and this required a larger administrative staff than would have been necessary, for example, had the trials been held at Frankfurt or Berlin, where the services of a central administrative headquarters could have been utilized.

Indeed, the mere size of the Nuernberg staff conveys no adequate impression of either the scope or complexity of the entire operation; the administrative problems which confronted me were quite as difficult and time-consuming as the legal questions. Not only in volume but in intensity the pressure was very great, and the day-to-day work load brought about a very considerable strain throughout the organization. During the first 15 months (October 1946 to December 1947) of OCCWC's existence, for example, the Interrogation Branch, with an average strength of 22 interrogators, conducted approximately 8,250 interrogations, an average of 370 per man.[143]

After the trials were well under way, the main load shifted to the Language and Reproduction Divisions and the Document Control Branch. During the winter of 1947–48 six trials involving approximately 100 defendants were simultaneously in process in the Palace of Justice, and two other tribunals were in Nuernberg receiving briefs and preparing their judgments. During the 12-month period from September 1947 to September 1948 the Language Division translated and stencilled 133,762 pages of material,[144] or about 520 pages per day. During the first three months of 1948 the Reproduction Division ran over 65,000 pages of mimeographed material per month, and the transcript of court proceedings for all courts averaged over 16,000 pages per month. Photostatic prints of documents were being produced by the Division at an average of over 175,000 per month. In all 12 cases, the prosecution alone offered 605 different document books, and in order to meet all legitimate demands for copies of these a total of over 46,000 copies of these books (including both the German and English versions) had to be assembled. These books comprised over 6 million pages. The defense document books assembled by the Defense Center were even more numerous. The transcripts of the proceedings in the 12 cases totaled approximately 133,000 pages of English

[143] As will appear hereinafter, this average of one interrogation per interrogator per working day was very arduous to maintain. *Infra,* pp. 58–62.

[144] Divided between prosecution and defense in the amounts of 45,387 and 87,875, respectively.

text and slightly more in the German text. In the light of these production figures it will be apparent that, if the Nuernberg staff was large, nevertheless everybody had quite enough to do.

Foreign Delegations

The London Agreement provided (Art. 5) that any government of the United Nations might "adhere" to the Agreement by giving notice in proper form. Nineteen nations (in addition to the four signatories) took advantage of this provision, and thereby endorsed the principles of the Agreement. Many of these countries sent observers and representatives to Nuernberg to assist in the preparation of the prosecution's case before the IMT.

The interest which a number of these countries thus manifested in the Nuernberg proceedings continued after rendition of the IMT judgment. The representatives of France, Poland, Czechoslovakia, and Holland at once announced their desire to maintain delegations at Nuernberg during the trials under Law No. 10, and a British delegation was established a few months later. These five Nations alone [145] were represented at Nuernberg throughout the duration of the trials under Law No. 10. However, delegations from Norway, Greece, Yugoslavia, and Belgium were temporarily accredited to Nuernberg for the duration of one or more particular cases.

Both the permanent and the temporary foreign delegations were of great assistance to the prosecution in ascertaining the facts concerning crimes and atrocities alleged to have been committed in countries which they represented and in procuring documents and witnesses for the court proceedings. The permanent delegations had a reciprocal mission to fulfill on behalf of their own governments in obtaining evidence for use in war crimes trials conducted in their respective countries, and in following the proceedings and sending back to their governments such portions of the testimony and exhibits or other documents as might be useful for legal, historical, or other purposes.

Defense Counsel

Under the conditions which prevailed in Germany shortly after the end of the war, it was absolutely necessary that the IMT undertake the responsibility of insuring that the defendants were adequately represented by counsel. The manner in which this responsibility was discharged has already been sketched,[146] together with some of the reasons why it was decided that, as a general rule, German attorneys could most effectively defend the accused.

One additional problem worthy of some mention which confronted

[145] A representative of the Soviet Union was accredited to Nuernberg in October 1946, but he departed from Nuernberg in December 1946 and did not return.

[146] *Supra,* pp. 29–30.

the IMT was whether German attorneys with active Nazi records should be allowed to act as defense counsel. Although no written rule governing this matter was ever promulgated, the IMT did settle on a fairly consistent practice in this regard. According to this practice, if a defendant requested representation by a lawyer with a definite or even conspicuous Nazi background, the IMT would not regard that circumstance as an obstacle to authorizing his appearance before the tribunal. However, the IMT did not include attorneys with such records in the lists of attorneys which were furnished to the defendants to assist them in making a selection.

The practice of the tribunals constituted under Law No. 10 was in general accord with the precedents established by the IMT. As stated above,[147] the expectation that German attorneys would act in most cases was embodied in Ordinance No. 7. Like the IMT, the later tribunals freely approved former Nazis as defense counsel upon application by any defendant.

In view of the part played by the Nuernberg Military Tribunals in the selection of defense counsel, it seems to be desirable that the names and qualifications of the 200-odd attorneys who acted as such should be made a matter of permanent record. Accordingly, at my request the Secretary General recently furnished me with a list, based upon the records available to him, containing the names and other pertinent data concerning the defense counsel in all 12 of the trials under Law No. 10. I have attached this list hereto as Appendix Q. The Secretary General has advised me that the records upon which this list is based are incomplete, but that probably only a few names are missing; however, the accompanying data with respect to a large number of the listed attorneys is complete.

The defense bar was at its peak size in March 1948, at which time it numbered 194, of whom 83 were main counsel and 111 assistant counsel. In the 12 trials, slightly over 200 persons acted as counsel or assistant counsel for the 177 defendants. With a handful of exceptions,[148] all of these were attorneys qualified to practice before the German courts, and all but three were Germans. The three non-German attorneys—Messrs. Warren E. Magee of the Bar of the District of Columbia, Joseph S. Robinson of the New York Bar, and Dr. Walter Vinassa of Switzerland—were approved by the tribunals on special applications to represent the defendants Ernst von Weizsaecker (Case No. 11), Friedrich von Buelow (Case No. 10), and Paul Haefliger (Case No. 6), respectively. These were the only applications by any of the defendants for permission to retain par-

[147] *Supra,* pp. 29–30.

[148] All but one of the main counsel were qualified attorneys; Admiral Schniewind, a defendant in the "High Command case" (Case No. 12), was represented by a former German naval officer who was not a lawyer. Several of the assistant counsel were military men, engineers, or economists without legal training.

ticular non-German counsel, except for an application filed on behalf of Alfried Krupp (Case No. 10) which, in its original form, did not give the name of the attorney in question and was denied for that reason, but which later was resubmitted as an application to retain one Earl Carroll. This application was rejected (by Tribunal III) primarily on the ground that OMGUS had refused (for other reasons) to permit Carroll to remain in the American zone of occupation.

While applications to retain particular German attorneys were never disapproved on the ground that the attorney had been a Nazi, they were on occasion rejected if it appeared that the attorney had endeavored to conceal this fact or had made any other false statements in his application. In fact, such false statements were only rarely made or discovered, and the great majority of applications were approved. It should not be concluded, however, that the defense bar did not include a large number of Nazi Party members. Most German attorneys had belonged to the Nazi Bar Association (the National Socialist *Rechtswahrerbund*), and in fact 136 of the 206 individuals employed as principal or assistant counsel had been members of the National Socialist Party or one of its branches, such as the SA ("Storm Troopers" or "Brown Shirts") or SS (Himmler's "Black Shirts"). As Appendix Q shows more particularly, 10 defense counsel had been members of the SS and 22 of the SA,[149] and 6 held some sort of office in the hierarchy of the Nazi Party. Of the remaining 99, 42 joined the Party between 1933 and 1937, and 57 between 1937 and the end of the war.

Apart from Party membership, a number of the defense counsel had a "personal interest" in at least certain phases of the proceedings. A number of the counsel and assistants in the "Farben case" (Case No. 6), for example, were or had been employed in the legal or technical departments of I. G. Farben. One of the most prominent defense counsel,[150] who upon occasion acted as spokesman for the defense bar, had been president of the German Bar Association at the time Hitler came to power. In this capacity he had, on 25 April 1933, circulated a notice to all members of the association, written by one Dr. Voss, the "National Socialist Confidential Agent" with the German Bar Association, urging "all Aryan members" to join the Nazi Party with the least possible delay.[151] This attorney no doubt spoke from the heart when he urged, on behalf of his clients (leading industrialists such as Schacht and Flick) that the pressure and dangers of the Nazi dictatorship had forced them, out of prudent regard for the preservation of their businesses, to take many steps in self-pro-

[149] Including 1 person who was in both, so that 31 individuals in all are involved.

[150] Dr. Rudolf Dix, who was main counsel for Schacht before the IMT and represented Friedrich Flick (Case No. 5) and Hermann Schmitz (Case No. 6) in the subsequent trials.

[151] See *Anwaltsblatt Nachrichten fuer die Mitglieder des Deutschens Anwaltsvereins*, Booklet 4, April 1933, pp. 129–130.

tection which they would not have taken in less tense circumstances. Another attorney [152] had served as Legation Counsellor at the German Embassy in Paris under Ambassador Abetz,[153] and in this capacity had had ample opportunity to observe the diplomatic steps taken in connection with the deportation of French Jews, the shooting of hostages, and the forced recruitment of slave labor. Such a man might be expected to have a well-developed personal attitude toward some of the matters charged against von Weizsaecker and other defendants in the "Foreign Office case" (Case No. 11).

In addition to assisting the defendants to obtain counsel, a great many services were rendered to defense counsel to facilitate their work. These services, as stated above,[154] were performed by the Defense Information Center under the Secretary General, and will be fully described in the latter's final report. Defense counsel were paid 3,500 RM (Reichsmark) per defendant per month, but not more than 7,000 RM per month.[155] Under the rules adopted by the tribunals, each defense attorney might represent two or more defendants in any one case, but could not represent defendants in more than two cases being tried concurrently before separate tribunals.

Defense counsel who did not live in Nuernberg were provided with billets through arrangements made by the Defense Center. They were also entitled to three meals per day at a cost of only 50 pfennigs per meal,[156] and were issued gratis a carton of cigarettes each per week. They were also provided with office space, furniture, and office supplies in the Palace of Justice. Witnesses requested by defense counsel were procured and were housed, fed, and paid (mileage and per diem) without cost to the defense.[157] When defense counsel found it necessary to travel to interview witnesses or for other reasons connected with the trial, railway transportation or the necessary amount of gasoline for privately owned automobiles was furnished free of charge. Extensive clerical and translation assistance, together with a great variety of other services, was also rendered.

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[152] Dr. Ernst Achenbach, who was counsel for Gajewski (Case No. 6) and Bohle (Case No. 11) up to the end of January 1948, when he ceased to act.

[153] Convicted of war crimes by a French tribunal at Paris on 22 July 1949, and sentenced to 20 years at hard labor.

[154] *Supra,* p. 37.

[155] Out of these fees, main defense counsel paid their assistants and secretaries.

[156] The food question was at times a difficult one. The IMT had made special arrangements to feed defense counsel from American Army rations. This was severely criticized in some quarters on the ground that defense counsel should not be favored over other elements of the German population to such a great extent. As Chief of Counsel, I joined with the judges of Military Tribunals I and II in January 1947 in recommending that the policy initiated by the IMT be continued. For the reason indicated above, however, OMGUS thought that it would be unwise to continue to furnish American food to defense counsel. They were, however, thereafter furnished sufficient food out of the Germany economy to equal the caloric content of Army rations, and were also given American coffee. This compromise may have lacked something in logic, but was accepted as reasonably satisfactory by defense counsel and all others concerned.

[157] For example, in the 4-month period ending 25 March 1948, 313 witnesses were requested, of whom 275 were located and produced at Nuernberg.

WAR CRIMES SUSPECTS AND WITNESSES

The problem of how to deal with the enormous number of suspected war criminals who were at large in Germany and Austria as the occupying Allied forces moved in was one of the most difficult which confronted the occupation authorities. For many months the United Nations War Crimes Commission had been compiling lists of suspects on the basis of information furnished from the countries occupied by Germany, and by the end of the war these lists were very lengthy. The Allied forces overran and liberated concentration camps and prisoner-of-war camps under conditions and circumstances which revealed that the most atrocious and extensive criminality had been involved in their operation. Examination of the tons of captured German documents revealed that responsibility for many of these crimes could be traced to the highest levels of the Reich government. Several large branches of the Nazi Party, such as the SS—with membership of hundreds of thousands or even millions of individuals—had been dedicated to the pursuit of criminal objectives, under precise written directives circulated very widely through these organizations.

While Nuernberg had a direct and profound interest in the solution of this problem, it was by no means the only agency involved. The occupational administration as a whole was deeply concerned from the angle of security. Those branches of OMGUS whose mission was to supervise the reestablishment of German governmental and political agencies and public or semipublic institutions were endeavoring to insure that former Nazis would not participate in or wield influence over these agencies and institutions. In addition to OCCPAC and OCCWC, the Judge Advocate's department of the Army was responsible for the apprehension and trial of certain categories of war criminals. The Intelligence services of the Army, Navy, and Air Force, as well as numerous other research, scientific, and cultural organizations, were intent on building up, piece by piece, the complicated and terrible picture of what had gone on in Germany under the Third Reich, and for this purpose wanted extensive access to thousands of Germans, many of whom were suspected war criminals, for interrogation purposes. The other occupying powers, as well as all the countries formerly occupied by Germany, were anxious to locate and apprehend thousands of suspected criminals who were or might be in the American zone of occupation.

The policies adopted in occupied Germany for the arrest and confinement of suspected war criminals and others reflected the wide variety of agencies and interests that participated in the formulation of these policies. In this combination of circumstances, Nuernberg played a very subordinate role, and the policies of OCCPAC and OCCWC had to be formulated so as to harmonize with the over-all occupational pattern.

Incarceration

In the American zone of occupation, the instructions bearing on the arrest and confinement of suspected war criminals (and other individuals thought dangerous to the security of the occupation) were embodied in the basic directive regarding the military government of Germany, known as J. C. S. 1067/6 and approved on 26 April 1945. The portion of this directive devoted to governmental and political matters included, in addition to a statement of "basic objectives," other sections covering denazification, demilitarization, political activities, education, etc. In this context paragraph 8, titled "Suspected War Criminals and Security Arrests," contained (subparagraph *a*) a general directive to the Commander in Chief of the United States forces of occupation that he should—

> * * * search out, arrest, and hold, pending receipt by you of further instructions as to their disposition, Adolf Hitler, his chief Nazi associates, other war criminals and all persons who have participated in planning or carrying out Nazi enterprises involving or resulting in atrocities or war crimes.

In addition, however, the following subparagraph (b) provided that all persons who, "if permitted to remain at large would endanger the accomplishment of your objectives," should also be arrested and held in custody "until trial by an appropriate semijudicial body to be established by you." The directive went on to specify a "partial list" of the categories of persons who should be arrested in accordance with this policy.[158] These categories included the following, among others:

> (1) Officials of the Nazi party and its formations, affiliated associations, and supervised organizations, down to and including local group leaders * * * and officials of equivalent rank;
>
> (2) All members of the political police, including the Gestapo * * *;
>
> (3) The officers and non-commissioned officers of the Waffen SS and all members of the other branches of the SS;
>
> (4) All General Staff officers;
>
> (5) Officials of the police holding a rank, or equivalent positions of authority, above that of lieutenant;
>
> (6) Officers of the SA holding commissioned rank;
>
> (7) The leading officials of all ministries and other high political officials down to and including urban and rural buergermeister and officials of equiv-

[158] With respect to the publication of this portion of Enclosure to J. C. S. 1067/6, see *supra*, p. 5, footnote 26.

alent rank, and those persons who have held similar positions, either civil or military, in the administration of countries occupied by Germany;

(8) Nazis and Nazi sympathizers holding important and key positions in (a) * * * civic and economic organizations; * * * (c) industry, commerce, agriculture, and finance; (d) education; (e) the judiciary; and (f) the press, publishing houses and other agencies disseminating news and propaganda * * *

(9) All judges, prosecutors and officials of the People's Court * * * and other extraordinary courts created by the Nazi regime * * *.

Insofar as war criminals were concerned, these provisions were supplemented, when J. C. S. 1023/10 was issued,[159] by instructions that "in addition to the persons * * * referred to in paragraph 8 of * * * J. C. S. 1067/6" the Commander in Chief of the occupation forces should also arrest "all persons whom you suspect to be criminals" within the definition of crimes embodied in J. C. S. 1023/10. In fact, with relatively few exceptions the so-called "automatic arrest categories" in J. C. S. 1067/6 were broad enough to include all or very nearly all suspected war criminals.

The question remained whether or not war crimes suspects were to be treated as ordinary prisoners of war and civilian internees, and accorded the type of treatment appropriate for prisoners and internees under customary international practice. This point was settled by Mr. Justice Jackson in the course of his first trip to Europe following his appointment as Chief of Counsel. In his preliminary report to the President of 7 June 1945, the Justice stated:[160]

> The custody and treatment of war criminals and suspects appeared to require immediate attention. I asked the War Department to deny those prisoners who are suspected war criminals the privileges which would appertain to their rank if they were merely prisoners of war; to assemble them at convenient and secure locations for interrogation by our staff; to deny them access to the press; and to hold them in the close confinement ordinarily given suspected criminals. The War Department has been subjected to some criticism from the press for these measures, for which it is fair that I should acknowledge responsibility. The most elementary considerations for insuring a fair trial and for the success of our case suggest the imprudence of permitting these prisoners to be interviewed indiscriminately or to use the facilities of the press to convey information to each other and to criminals yet uncaptured. Our choice is between treating them as honorable prisoners of war with the privileges of their ranks, or to classify them as war criminals, in which case they should be treated as such. I have assurances from the War Department that those likely to be accused as war criminals will be kept in close confinement and stern control.

These directives and arrest categories reflected the extraordinary situation which prevailed in Germany at the end of the war. It would have been, of course, a normal incident of the termination of hostilities that large numbers of prisoners of war should have remained in confinement while being screened for suspected war criminals and

[159] 15 July 1945. See *supra*, pp. 4–6.

[160] *International Conference on Military Trials, op. cit. supra*, p. 45.

while preparations for their demilitarization and release from confinement were being perfected. But in the chaotic ruins of Nazi Germany in 1945, soldiers were not the only ones who had to be temporarily confined. The prime objectives of the occupation—shared, indeed, by the democratic elements of the German population itself—were "the elimination of nazism and militarism in all their forms" [161] from the German political and social structure. The government of the Third Reich had disintegrated and completely disappeared, no means were at hand for the re-establishment, short of a period of several years, of a democratic German central government, and the entire task of central administration thus had to be assumed by the occupying authorities. The former high-ranking officials of the Reich government and the SS, the leading Party officials, and hundreds of other Nazis and Nazi supporters or collaborators had to be arrested and confined without delay. Quite apart from the fact that there was ample evidence to warrant criminal charges against many of them, these groups would have been a grave threat to the security of the occupation and an insuperable obstacle to the development of democratic, social, and political institutions in Germany. Furthermore, most of them would have become fugitives from justice or the retribution of those whom they had once oppressed so terribly; Gauleiters and Nazi government ministers wandering at large throughout Germany would have been a target for acts of private vengeance and a stimulus to political violence on a large scale.

Of necessity, therefore, a number of civilian-internment enclosures, as well as prisoner-of-war camps, were established by the occupation authorities. Suspected war criminals, were, for the most part, incarcerated at Nuernberg or at Dachau, where the war crimes trials conducted by the Theater Judge Advocate were to be held. With few if any exceptions, however, the suspects imprisoned at Nuernberg fell in the "automatic arrest" categories, and would, therefore, have been confined elsewhere even if released from Nuernberg.

If the need for these measures was abundantly manifest, it was no less apparent that they should be of as short duration as possible. The sooner that the denazification program and the war crimes trials at Nuernberg and Dachau could be mapped out and gotten under way, the sooner it would be possible to release those who were not to be charged with war crimes and those whose Nazi records were not so glaring as to require confinement pending their appearance before a Spruchkammer. At the same time, progress could be made with the review of the thousands of requests for "extradition" of individuals or groups of civilian and military internees to the countries formerly occupied by Germany to answer charges of atrocities committed there during the period of German occupation.

[161] J. C. S. 1067/6, Par. 4*c* of Enclosure.

These circumstances confronted me with a number of very difficut questions when I returned to Nuernberg in May 1946 and began to plan for the trials to be held under Law No. 10. The categories specified in J. C. S. 1067/6 undoubtedly comprehended over a million persons in all Germany, of whom several hundred thousand at least were in the American zone of occupation. Yet it had never been my thought that more than a few hundred individuals could or should be tried before the Nuernberg tribunals.[162] These few hundred, obviously, should be those highly placed individuals who bore the greatest responsibility for formulating and ordering the execution of the criminal policies which directly led to and instigated the aggressive wars and mass atrocities launched and committed under the authority of the Third Reich.

Who were those individuals? Obviously it would have been a never-ending process to examine the records, one by one, of those who were confined pursuant to J. C. S. 1067/6. Every humanitarian and practical political consideration dictated the utmost expedition in developing the general scope and framework of the Nuernberg program. But this was a formidable task which, in May 1946, had not yet even been begun. Mr. Justice Jackson's staff, quite rightly, was almost wholly concerned with establishing the guilt of the 22 individuals on trial before the IMT and the "organizational guilt" of the SS, the Gestapo, and the other indicted organizations.

Accordingly, immediately after my return to Nuernberg a branch of the Subsequent Proceedings Division was established for the purpose of making an over-all study of Germany's political, military, economic, and social organization so that the principal channels of responsibility and authority in the Reich government and industry could be determined, and the most responsible individuals in each field of enterprise or government activity identified. On the basis of the study made by this section, supplemented by evidence and information developed by the other sections of the Division, as early as August 1946 it was possible to produce and distribute to the various prisoner-of-war camps and civilian internment enclosures a list of individuals who were tentatively identified as war crimes suspects for purposes of the Nuernberg trials and who should not be released from confinement until further notice. This list contained less than 5,000 names and represented a reduction to workable size of the group of suspects whose records it was the function of the Subsequent Proceedings Division (and later of OCCWC) to scrutinize.

Many of the individuals named in this list had not yet been found, and all or substantially all who were then in confinement were prisoners of war or members of "automatic arrest" categories. Practically all of the listed individuals, therefore, would have remained in confine-

[162] *Supra*, pp. 15–17.

ment had the list never been circulated, and certainly not more than a handful (if any) new arrests were made on the basis of the list. Nevertheless, intensive efforts continued to be made throughout my staff to cut down the number of people whose continued confinement Nuernberg was requesting.

The method by which the defendants in the 12 cases were eventually selected is described below.[163] By 10 May 1947, the first seven indictments (naming 100 individual defendants) had been filed, and the scope of the entire program substantially determined. As I reported to General Clay on 20 May 1947, the number of individuals held in confinement at the request of OCCWC [164] had by then been cut to 570, including those actually under indictment, and the great majority of those imprisoned but not indicted were high-ranking government officials or SS officers who would have been confined in German enclosures awaiting denazification had they been released by Nuernberg.

Between May 1947 and the end of that year, all five of the remaining indictments were filed, naming 85 additional defendants (thus 185 in all 12 cases). Likewise, the first five cases (in which 64 were indicted and 62 actually tried) were concluded, and the defendants imprisoned under sentence if convicted, or set free if acquitted. By January 1948, accordingly, the number of individuals (other than convicts) held for OCCWC had dwindled to about 240, of whom 117 (about one-half) were indicted and in the course of trial. All but six of the others (about 110 in all) were prospective witnesses (mostly for the defense) who were in automatic arrest categories, and who were transferred to German custody (awaiting denazification proceedings) when subsequently released from Nuernberg. The six "special cases" were individuals not in automatic arrest categories but who were held under serious charges of criminality pending transfer to German authorities for trial before German tribunals.

The German witnesses who appeared before the Nuernberg tribunals—whether for prosecution or defense—fell into two general categories. Those who were not subject to automatic arrest came to and departed from Nuernberg "under their own steam," their transportation paid for through the Defense Information Center. While in Nuernberg they were billeted and fed at the so-called "Voluntary Witness House" and were, of course, completely at liberty. A large number of other witnesses, however, were leading Nazis subject to automatic arrest; some of them indeed, had themselves been tried or were awaiting trial as war criminals. Such witnesses were brought to Nuernberg under guard and were held in the jail during the time they spent in Nuernberg being interrogated or giving testimony; when they were no longer needed as witnesses they were returned to their former

[163] *Infra*, pp. 73–85.

[164] Over 400 of these were in the Nuernberg jail, and the remainder were held at Dachau.

place of confinement. Some of them, most of whom were called by the defense, were asked for as witnesses by a number of defendants in several different proceedings, and in such circumstances might spend a considerable period of time in the Nuernberg jail. In fact, late in 1947 and early in 1948 it became apparent that a number of defense witnesses were seeking to remain in the Nuernberg jail as long as possible, in order to avoid extradition to other governments or to stall off their denazification trials, in hopes that the passage of time would work to their advantage and that they might ultimately escape extradition or denazification, as the case might be.

The number of Germans in prisons or enclosures during the first 2 years (particularly during the first 18 months) of the occupation was a cause of some concern to the American occupation authorities, both at Nuernberg and Berlin. In an ideal world, no doubt no one would have been incarcerated without prior arraignment before a committing magistrate on specified charges—but then in an ideal world there would have been no war, no postwar problems and no need to incarcerate anyone.

In point of fact, the conditions which prevailed in Germany at the end of the war made it quite impossible to observe all the usual pretrial procedures which are ordinarily followed in peacetime practice. If the occupying authorities had determined that no German should be arrested except under the authority of a magistrate, and that anyone so arrested should be given immediate access to counsel, where would the magistrates and counsel have been found? American judges and lawyers could not possibly have been obtained in the requisite numbers. The judicial system of Germany had been poisoned and perverted almost beyond recognition during 12 years of Nazi domination. The bench had lost practically all semblance of judicial independence, and bench and bar alike had been dominated for years by the most virulent and pernicious Nazi elements. The opinion of Military Tribunal III in the "Justice case" (*United States* v. *Josef Alstoetter, et al.*, Case No. 3) contains a full account of "the progressive degeneration of the judicial system under Nazi rule" and "the utter destruction of judicial independence and impartiality." [165]

The defense bar at Nuernberg, indeed, represented their clients ably and conscientiously. But, as has been seen, a majority were former Nazi Party members and a number had conspicuous Nazi records. That a German lawyer had been a Nazi did not necessarily mean that he was an unreliable or unscrupulous individual, but it did afford ample reason to withhold final judgment on his trustworthiness until time and opportunity for observation furnished a sound basis for judgment.

[165] Transcript of proceedings, pp. 10650, and 10703.

During the first 2 years of the occupation many notorious war crimes suspects were still at large as fugitives. The structure of the Third Reich and the main channels of authority were but imperfectly understood at the outset, and extensive interrogation and study of documents was necessary before intelligent decisions could be made on who probably was and who probably was not to blame for a particular category of crimes or atrocities. To have introduced into this situation German judges and lawyers, most of whom had been Nazis to a greater or less degree, would have jeopardized and delayed the entire investigative process.

In short, it rapidly became very clear at Nuernberg that the fairest and most practical course of action was to push the investigative process with the utmost speed, by screening documents, by interrogation, and in every other possible way. In this manner, decisions could most rapidly be reached as to which individuals should be tried for war crimes. The faster this could be accomplished, the sooner those who were not to be so charged could be removed from the list of suspects and released or turned over to the German denazification authorities. As the statements and figures above show,[166] the matter was reduced to one of small proportions in the course of one year's hard work.[167] By May 1947 only a few hundred individuals were still held in arrest as possible Nuernberg defendants, and by the end of 1947 the problem no longer existed.

Finally, a few words should be said about the Nuernberg jail, which was situated immediately behind and adjoined the Palace of Justice. The operation of the jail was at no time under the direction of either Mr. Justice Jackson or myself. During the first Nuernberg trial before the IMT, the jail was under the charge of a special Internal Security Detachment[168] (commanded by Col. B. C. Andrus) which reported directly to the Headquarters of the Third Army. In October 1946, after rendition of the IMT judgment and at the time OCCWC was established, prison operations came under the Commander of the Nuernberg Post (Brig. Gen. Leroy H. Watson). Thereafter, the Post furnished the prison commandant and staff, as well as the guards, cooks, and other necessary prison operations personnel.

While OCCWC did not at any time control the jail, prison operations were nevertheless a matter of interest to me and my staff. Unsatisfactory conditions in the jail might result in complaints being made through defense counsel before the tribunals, or otherwise arouse criticism of the Nuernberg operation. Acccordingly, my office maintained close and constant liaison (through the Executive Officer and

[166] *Supra,* pp. 54–55.

[167] From May 1946, when the Subsequent Proceedings Division commenced operations, to May 1947.

[168] Designated the 6850th Internal Security Detachment.

the Director of the Evidence Division)[169] with the Prison Commandant, and maintained a constant check on the prison temperature (in cold weather), the caloric content of the food, and other conditions in the jail. The prison was large, and overcrowding was a problem only during the spring and summer months of 1947 (March to September), when, with over 100 defendants under indictment, several other large cases in preparation, and a large number of "automatic arrestees" in Nuernberg as defense witnesses, the population of the prison rose to and remained over 400. By the late autumn of 1947 the overcrowded condition had been corrected, and did not recur.

So far as prison conditions permitted, the prisoners were given the choice of confinement two to a cell or singly. Often they were hard to please in this respect; prisoners given a cell to themselves tended to protest that they were being unjustly subjected to solitary confinement; when "doubled up" with another prisoner, they would complain that the lighting and other facilities were inadequate to permit two inmates to do the necessary reading and other work in connection with their trial. As a rule, individuals thought to be suicide risks were required to share their cell with another prisoner.

Throughout the period that, as Chief of Counsel, I was in a position to observe prison operations, it appeared to me that they were intelligently and humanely conducted.

Interrogation

When Mr. Justice Jackson's staff was assembled at Nuernberg in August 1945, it included from the outset a division established for the purpose of conducting interrogations of potential witnesses and probable defendants. Under the direction of Col. John Harlan Amen, this Interrogation Division questioned a large number of individuals prior to and during the first Nuernberg trial before the IMT, especially during the period from August 1945 to the spring of 1946.

The Nuernberg interrogations were, of course, only a few among the vast number which were being carried out elsewhere throughout occupied Germany by a great variety of other organizations. In the American and British zones of occupation, special interrogation centers had been established immediately after the termination of hostilities, as part of the operations of the British and American intelligence services. The Historical Division of the United States Army embarked on an extensive series of military interrogations to obtain information for the preparation of war histories. To a large extent, the work of special surveys (such as the United States Strategic Bombing Survey and the British Bombing Survey Unit) and technical missions (such as the Field Intelligence Agency, Technical) de-

[169] Lt. Col. A. J. Maroun and Mr. Walter H. Rapp, respectively.

pended upon an effective and large scale interrogation program. Countless other military, governmental, and other public and quasi-public units, missions, and observers flocked to the American and British occupation zones in search of information of one kind or another which could only be obtained by questioning.

Without exception, the numerous such interrogations which I heard about or had opportunity to observe were carried out in a thoroughly humane fashion, and no objectionable means were used to elicit information from those who were questioned. They were conducted for the most part by intelligence officers, technical specialists, or other specially trained personnel whose main object was to obtain accurate information of value to Allied military men or scientists; it should be recalled that in the early months of the occupation the war with Japan was still in process. They were not carried out in the manner of "pre-trial interrogations" as known to American courts, and it would never have occurred to the interrogators, for example, to warn the individual being questioned that anything he said "might be used against him."

For the most part, the Germans who were questioned at Nuernberg and elsewhere talked with the greatest freedom; indeed they were often much too voluble. Needless to say, many of them were worried about the possible consequences of their past deeds, and were anxious to give their versions of questionable episodes with little or no prompting from the interrogators. In their haste to justify, excuse, or mitigate they were prone to reveal facts or circumstances of considerable importance from the standpoint of war crimes, and were often eager to point the finger of suspicion at others if such behavior seemed advantageous to them.

Thus it came about that the individuals brought to Nuernberg had as a general rule been interrogated on numerous prior occasions. Records or summaries of these interrogations were usually available; most of them were primarily of military or technical interest, but frequently they contained much information of value in the preparatory work done at Nuernberg, and upon occasion they contained significant admissions.

Colonel Amen's staff of interrogators consisted mostly of American attorneys, very few of whom were familiar with the German language. Consequently, they were obliged to carry on their questioning with the assistance of interpreters.[170] According to the usual routine adopted in Colonel Amen's division, the interrogator would interview the subject in the presence of an interpreter and a shorthand reporter. The interrogator would put questions in English, and the interpreter would repeat them in German; the subject would reply in German, and the

[170] A number of the Nuernberg defendants and witnesses spoke good English, but only a few of them (notably Schacht) were willing to be questioned in English.

interpreter would translate the reply into English. The shorthand reporter (who ordinarily was familiar with English only), in the meantime, would record the question as put by the interrogator in English, and the answer as translated by the interpreter into English. Subsequently, the records of the interrogations were prepared in typewritten form, but these records were not generally distributed to the other lawyers on the prosecution staff.

The methods described above did not seem to me especially suitable to the needs of the Subsequent Proceedings Division or (later) of OCCWC. They had been adopted by Colonel Amen, I believe, on the basis that the principal function of his division was to discover individuals to give credible testimony useful to the prosecution in the proceedings before the IMT. However well adapted these methods of interrogation may have been for that purpose (and several excellent witnesses were indeed produced by Colonel Amen),[171] they did not meet the more varied requirements I had in mind. Courtroom witnesses were welcome, to be sure, but even more we needed to build up a body of reliable information on the structure and functioning of the German Government and of numerous German political, economic, military and cultural organizations, and concerning the identity and characteristics of the leading Germans who directed and participated in the work of these agencies. Insofar as this information was obtained from interrogations, I wanted it made available with the least possible delay to the attorneys and their research assistants who were preparing the charges and specifications against those later to be tried.

For the achievement of these ends, the methods employed during the first trial had obvious shortcomings. Interrogation by a lawyer through an interpreter in the presence of a reporter tended to create a stiff, formal atmosphere. The lawyers often imagined that they were already in the courtroom, and sought to "score off" the person being questioned; these efforts, even when successful, accomplished nothing useful. It was difficult if not impossible to establish any *rapport* between the questioner and the subject, and the fact that all intercourse had to be channeled through an interpreter made matters even worse in this respect. The need for interpretation of every question and answer delayed the progress of the interrogation, and meant that less could be accomplished in a given time. Finally, the procedure was technically deficient in that the record did not embody the answers actually given by the witness (in German) or the questions which he actually heard (in German).

Accordingly, the Interrogation Branch [172] of OCCWC utilized quite

[171] For example, Lahousen and Ohlendorf.

[172] Mr. Benno Selcke, as Deputy Director of the Evidence Division, and Mr. Fred Kaufmann, as Chief of the Interrogation Branch, were Mr. Rapp's deputies for the direction of interrogations.

different methods.[173] The members of the branch were not lawyers, but all spoke fluent German, and most had had considerable interrogation experience during and since the war. The interrogators were assigned to work with the various legal divisions and trial teams who were preparing cases for trial, and became intimately familiar with the subject matter and documentation of the cases in which they specialized. They worked very closely with the lawyers and research associates, and became, for all practical purposes, an integral part of the "team". With the background of information thus obtained, the interrogators, even though they were not lawyers, were fully qualified to handle the necessary questioning, working under general instructions from the lawyers.

All the interrogators talked with the subjects in German, and a sound recording (on tape) was made of the entire conversation, so that there was no need for the presence of either an interpreter or a reporter. Translations of the important portions of these interviews were prepared in typewritten form for the lawyers immediately concerned, and mimeographed summaries (in English) of all interrogations conducted by the branch were circulated to all the legal divisions, so that the information obtained thereby would be generally available throughout OCCWC. From November 1946 to December 1947, over 200 such summaries were circulated each month, and during the spring and summer of 1947 over 300 per month.

When OCCWC came into existence in October 1946, the Interrogation Branch consisted of 17 interrogators; it increased in size thereafter and comprised 24 members from June to August 1947. By July 1948 the branch was only half its peak size, and thereafter dwindled very rapidly until it ceased to exist in October 1948. During its life, the branch conducted approximately 10,000 interrogations, of which over 7,000 took place during the year 1947. From April to August 1947 an average of over 700 interrogations per month were handled, with the peak of 790 being reached in July. During the "heavy" period, each interrogator conducted an average of one interrogation per day which, considering the necessary amount of preparatory and other work which the interrogators were required to do, to say nothing of time spent in travel, preparing summaries, checking translations, and conferring with the attorneys, was a very impressive rate of accomplishment.

Nevertheless, the Interrogation Branch was unable to fulfill all the requests for interrogations made by the legal divisions as OCCWC's over-all volume of work expanded. For this reason, and in the interests

[173] Some of the methods described herein were first utilized at Nuernberg on the recommendation of Wing Commander Peter Calvocoressi, in preparing the evidence presented before the IMT with respect to the General Staff and High Command of the German armed forces, in which Mr. (then Captain) Walter H. Rapp, Major Paul Neuland, and several other experienced interrogators participated.

of flexibility, the rule that all questioning should be done by members of the Interrogation Branch was not hard and fast. A number of the German-speaking attorneys were allowed to participate, as well as a few of the highly trained research associates. On rare occasions, other attorneys conducted interrogations using interpreters. It was the firm rule, however, that all interrogations should be conducted in accordance with the standards and procedures prescribed for and followed by the Interrogation Branch.

Prior to the time that a given individual was definitely selected as a defendant by inclusion in an indictment, there was no requirement that he be formally warned that "anything he might say might be used against him." Such a formal warning would have had little real meaning under the circumstances; those who came to Nuernberg knew that documentary and other evidence was being assembled and examined in order to determine who should be tried and who would not be tried, and the prisoners, almost without exception and including even those who suffered from "bad consciences," were anxious to tell their stories in the hopes that the blame for what had occurred would be laid elsewhere.

Categorical instructions were given from the very outset that interrogators should under no circumstances resort to threats, promises, or deceptive devices of any kind. The "Interrogator's Guide" circulated by Mr. Rapp on 8 July 1946 declared:

> It is of primary importance that you are aware of the nature of the work you are engaged in now and the principles which should guide you in its performance. These are not wartime operational interrogations where any means that served to get the information were all right. You are now connected with a legal trial where you must let yourself be guided by professional, ethical standards. If you don't, you degrade yourself to shyster status. Any form of duress is out. Equally out are any loose promises to any prisoner for supplying you with evidence. Keep in mind that your report can only be used if at the end the prisoner signs it in affidavit form. You cannot force a man to sign anything. He must sign voluntarily. Anything else would be indefensible in court.

Throughout the existence of the Subsequent Proceedings Division and OCCWC, it never came to my attention that any member of the Interrogation Branch departed from these instructions. I am satisfied that any such departures would have come to my knowledge, either through protests by defendants, witnesses, or defense counsel, or in some other fashion. In fact, in the handful of cases where interrogations conducted by lawyers or research associates were not in compliance with the prescribed standards, reports of the violations reached me with but little delay. These two or three infractions of the rule in the spring of 1947 were trivial in themselves, but resulted in the issuance by me of a memorandum restating the procedures and standards for interrogation, which is attached hereto as Appendix R.

INDICTMENTS

What crimes were to be charged in the trials under Control Council Law No. 10, and who was to be accused of their commission? This was the first and most fundamental question that confronted us when the Subsequent Proceedings Division began work in the spring of 1946.

In broad outline, the first of these questions was governed by the express provisions of Law No. 10, itself. The crimes to be charged had to be those defined in Article II thereof, and these were the same categories of crimes described in slightly different language in Article 6 of the London Charter. However, within the ample limits of these broad categories there was a wide field for choice and decision. Should equal importance be attributed to all three categories and to the numerous specifications within each? And if not, where should the main emphasis be placed?

Much preliminary study was devoted to these questions, and to the selection of defendants, during the life of the Subsequent Proceedings Division. It was quite impossible, however, to arrive at final decisions on most of these problems until the IMT's judgment had been rendered.[174] How would the IMT treat the common plan and conspiracy charge? What sphere of personal responsibility for the planning and initiation of aggressive war would the judges mark out? Would the judgment insist on literal compliance with the Hague and Geneva Conventions in all respects, or would it declare that the common practice of civilized nations generally had already rendered some provisions of those treaties obsolete? Would crimes committed before the outbreak of war be noticed, or dismissed as beyond the Tribunal's jurisdiction? How would the effort to obtain declarations of criminality against the organizations work out? How far would the IMT go in allowing the fact of "superior orders" to operate in mitigation?

Pending the treatment of these and other such questions in the judgment, the time could best be spent in assembling and sorting out the evidence so that we would "know what we had to go on" when the time came. In the course of this process, the outlines of one or two cases rapidly emerged which, it appeared, would rest on a solid foundation even if the IMT decision should prove far narrower than was the general expectation. Foremost among these was the so-called "Medical case" which, as will be seen below,[175] was not only the first case to

[174] *Supra*, pp. 15–21.
[175] *Infra*, p. 71.

be brought under Law No. 10 but in many respects the prototype of others that were to follow.

The Charges

The London Charter and Control Council Law No. 10 both sought to point out four categories of acts or factual types of conduct (as distinguished from juridical concepts) and make them punishable under international law. The first and most important was *war-making* itself. The acts constituting war-making were denominated "crimes against peace," and the description of these acts (both in the Charter and Law No. 10) consisted principally of a listing of the stages (in a temporal sense) at which punishable acts might be committed—i. e., in the initial stage of "planning," the secondary stage of "preparation," the stage of actual commencement described as "initiation," and finally that of "waging." Both the London Charter and Law No. 10 proscribed activity at any of these stages involving either a "war of aggression" or a "war in violation of treaties" and the wording of Law No. 10, but not that of the Charter, stated expressly that "invasions" were punishable as well as "wars."

The second type of conduct can perhaps be best characterized as *foul play in combat or against combatants.* These were described as "war crimes," and comprise the classic violations of the laws of war as set forth in the Hague and Geneva Conventions, such as the use of unnecessarily painful weapons (dum-dum bullets, poison gas, etc.), unwarrantably ruthless employment of new engines of warfare (e. g., submarines and airplanes), or the denial of quarter, the slaughter of prisoners of war, etc.

The third proscribed category I will denominate the *suppression, decimation, or exploitation of the inhabitants and resources of territory under military occupation.* These acts, too, fall within the definition of "war crimes" and involve conduct forbidden by the laws of war and the Hague Conventions. They are also within the scope of the definition of "crimes against humanity." These "occupation offenses" include such repressive measures as the execution of hostages, exploitation of the occupied region by plundering movables or expropriating fixed capital, and impressing workers and others to forced labor either in the occupied country or, after deportation, in other localities within or controlled by the occupying power.

Finally there were the crimes which the average man would think of as most characteristic of the Nazis, and which we may describe as *degradation or extermination of national, political, racial, religious, or other groups.* These crimes cover the vast and terrible world of the Nuernberg laws, yellow arm bands, "Aryanization," concentration camps, medical experiments, extermination squads, and so on. These were the sort of deeds and practices which the provisions of the defini-

tion concerning "crimes against humanity" were intended to reach. Actually, when committed in the course of belligerent occupation (whether in the occupied country or elsewhere), these were also "war crimes." But the concept of "crimes against humanity" comprises atrocities which are part of a campaign of discrimination or persecution, and which are crimes against international law even when committed by nationals of one country against their fellow nationals or against those of other nations irrespective of belligerent status.

In the course of preparing the indictment for the first Nuernberg trial, it became apparent that the second category described above, i. e., "combat crimes," would prove of considerably less importance than the other three. Many of the provisions of the Hague Conventions regarding unlawful means of combat (such as those referring to poisoned arrows and the poisoning of wells) were antiquarian. Others had been observed only partially during the First World War and almost completely disregarded during the Second World War. Rules governing submarine warfare, which originated for the natural and laudable purpose of preventing unnecessary loss of life among crewmen and passengers of torpedoed vessels, could only rarely be honored under the new conditions of warfare brought about by modern aviation, radar, etc. If the first badly bombed cities—Warsaw, Rotterdam, Belgrade, and London—suffered at the hands of the Germans and not the Allies, nonetheless the ruins of German and Japanese cities were the results not of reprisal but of deliberate policy, and bore eloquent witness that aerial bombardment of cities and factories has become a recognized part of modern warfare as carried on by all nations.

The indictment in the first Nuernberg trial, accordingly, contained no charges against the defendants arising out of their conduct of the war in the air. Admirals Raeder and Doenitz were, to be sure, accused of war crimes "arising out of sea warfare," without further specification.[176] In my opinion unwisely, the British prosecution staff at Nuernberg undertook to press home these general charges and sought conviction of the two admirals for war crimes committed by German submarine crews. These charges met with only technical success.[177]

It seemed clear to me, therefore, that whatever questions of law and morals might be involved in aerial and submarine warfare, they could not be settled or helpfully treated by criminal process at Nuernberg. None of the 12 indictments touched these questions. Indeed, in all 12 of the trials under Law No. 10 taken together, charges

[176] *Trial of the Major War Criminals, op. cit. supra,* Volume I, pp. 78–79.

[177] *Op. cit. supra,* pp. 311–315, 316–317. The IMT judgment "censured" Doenitz and Raeder, but declared that their sentences were "not assessed on the ground of * * * breaches of the international law of submarine warfare."

arising out of combat operations of any kind played only a very small part.[178]

There was, however, one type of crime involving combatants which deserved and received considerable attention in several of the Nuernberg trials. This was the outright slaughter of certain categories of prisoners of war. A good example was the order, originally issued by von Rundstedt[179] in July 1942 and subsequently (October 1942) adopted, amplified, and distributed by Hitler, calling for the execution of captured "commando troops," whether or not in uniform. Equally murderous orders were distributed and carried out on the eastern front, pursuant to which Jewish soldiers, Soviet military commissars, and certain other categories of captives were executed even when captured in full military uniform. The crimes committed against prisoners of war under these and other orders were dealt with in three of the trials under Law No. 10.[180]

Ever since Justice Jackson's report to the President in June 1945 and throughout the first Nuernberg trial, the concept which had at one and the same time awakened the most fervent support and aroused the sharpest criticism was the one denominated "crimes against peace"—war-making itself, the first category mentioned above. In its judgment, the IMT declared that war-making "is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole."[181]

Out of strong personal conviction no less than because it was my official duty to enforce the provisions of Law No. 10—including its proscription of war-making—I directed that the staff of OCCWC should concentrate a large share of its time and energy on the analysis of evidence and the preparation of charges relating to "crimes against peace." The proof necessary to support these charges is, as a rule, more extensive and complicated than in the case of war crimes and atrocities. Men plan and prepare for war by acts lawful in themselves—economic estimates, military plans and maneuvers, the manufacture of weapons, political memoranda—and to prove that these things are done with guilty intent to initiate an aggressive war is difficult enough at best. It was unusually easy in the cases of

[178] The "Hostage case" and "High Command case" (*United States* v. *Wilhelm List,* Case No. 7 and *United States* v. *Wilhelm von Leeb,* Case No. 12) embodied certain charges relating to unwarranted devastation of cities and towns in the course of military operations.

[179] Von Rundstedt's order is dated 21 July 1942, at which time the former field marshal was commander in chief in the West. This order was one of a number issued or distributed by von Rundstedt which led the British Government to announce the intention to try him as a war criminal, an intention which was frustrated by von Rundstedt's age and incapacity to stand trial. Von Rundstedt's "commando order" was quoted by the Lord Chancellor (Lord Jowitt) in his speech in the House of Lords on 2 November 1948, explaining the British plan to try von Rundstedt together with Field Marshals von Brauchitsch, von Mannstein, and General Strauss. Hansard, Vol. 159, No. 4 (2 November 1948), p. 170.

[180] Primarily in the "Hostage case" and the "High Command case," and secondarily in the "Ministries case" (*United States* v. *Ernst von Weizsaecker,* Case No. 11).

[181] *Trial of the Major War Criminals, op. cit. supra,* Volume I, p. 186.

Goering, Ribbentrop, and others who were present at conferences (recorded in writing with typical German thoroughness) at which Hitler and his associates spoke openly of their intentions. But even the most damning memoranda of this sort can be minimized by clever explanation and excuse, and failing such documents the guilty intent must be proved by the attendant circumstances.

For this reason, the cases in which the crime of war-making was charged took much longer to prepare than those solely concerned with war crimes and atrocities. Eventually four such cases—the "Farben case" (*United States* v. *Carl Krauch*, Case No. 6), the "Krupp case" (*United States* v. *Alfried Krupp*, Case No. 10), the "Ministries case" (*United States* v. *Ernst von Weizsaecker*, Case No. 11) and the "High Command case" (*United States* v. *Wilhelm von Leeb*, Case No. 12)—were tried. In at least two other cases—the "Milch case" (*United States* v. *Erhard Milch*, Case No. 2) and the "Hostage case" (*United States* v. *Wilhelm List*, Case No. 7)—there was substantial evidence at hand on the basis of which the charge of war-making could properly have been made. I decided not to include "crimes against peace" in these cases in order to restrict the issues for trial, in the interest of economy and expedition, and because there seemed to be ample evidence in support of other serious charges. In this latter respect, my estimate proved correct, but in retrospect my decision, at least in the "Milch case," appears to have been erroneous.[182]

Most of the Law No. 10 trials involved at least some charges falling in the third broad category—"occupation offenses"—and several were predominantly concerned with this type of crime. The specific offense on which greatest stress was laid was the forcible deportation of workers from France, Poland, Russia, and the other occupied countries to Germany, and other places, for use as slave laborers. The German slave-labor policy had been treated at length in the judgment of the IMT,[183] and was the principal basis for the convictions of Sauckel and Speer. Furthermore, the problem of forced-labor was of current importance and particular significance in view of rumors and reports that it was prevalent in one or more countries of eastern Europe. It seemed to me that vigorous prosecution of those who were guilty of deporting and enslaving foreign workers under the Third Reich would make it clear beyond doubt that the United States did not condone such practices at any time or under any circumstances. Furthermore, German defense counsel soon began to argue (basing their argument on the charge that the Soviet Union was deporting Germans and others to forced labor in Russia) that Germans should not be punished for offenses which were being committed in other countries. It seemed to me that this conclusion was unsound and in fact just the

[182] *Infra*, pp. 92–93.
[183] *Trial of the Major War Criminals, op. cit. supra*, Vol. I, pp. 243–247.

reverse of the correct one. In its closing argument in the "Flick case" (*United States* v. *Friedrich Flick*, Case No. 5) the prosecution took note of the defense contention that "subsequent to the military defeat of Germany and the quadripartite occupation of German territory the Soviet Union has deported Germans to slave labor and plundered German property." The prosecution observed that "in meeting the arguments, we will assume that these assertions are true" and went on to say:[184]

> We earnestly suggest to the Tribunal that this is a most dangerous line of thought. We will say quite bluntly that we think defense counsel are ill-advised to put it forward. We cannot see how it can benefit their clients and it can do nothing but harm to Germany. This argument, if it should prevail, would not lead to a judgment that the defendants are innocent of enslavement and plunder; it would lead to a judgment that enslavement and plunder are no longer crimes. Such a judgment would be a serious, and possibly mortal, blow at the foundations of peace and justice. It would greatly increase the hazards under which weak or defenseless nations exist in a restless world. It would render them subject to the same type of occupation that Germany herself has visited upon most of Europe, and would leave them no eventual recourse against their oppressors.
>
> Apart from the terrible implications of such a judgment, this argument is quite unknown to the law. The law does not exist only by virtue of its own enforcement, though a substantial measure of enforcement is necessary to perpetuate the law. But it is unfortunately true that in this world crime often goes undetected and unpunished. Never has it been suggested that this circumstance should be a defense where the defendant is before the court. Recognition of such a defense would mean nothing less than the disappearance of law.
>
> It is precisely this line of thought, we submit, which has brought about the disintegration of Germany. Because crime was encouraged and committed in certain high places, it ceased to be regarded as crime in the courts. The argument put forward by defense counsel, we suggest, reflects this attitude. Germany has nothing to gain and everything to lose from such an unhappy relaxing of the standards of international conduct. Enforcement of the law in this case, if the evidence establishes guilt, must sooner or later operate as a deterrent in other circumstances, and Germany, like all nations, has everything to gain and nothing to lose by the reaffirmation of moral and civilized standards of conduct.

Accordingly, in six of the Law No. 10 trials "slave labor" charges played a leading part. These were the "Milch," "Pohl," "Flick," "Farben," "Krupp," and "Ministries" cases (Cases No. 2, 4, 5, 6, 10, and 11, respectively). In five of these (all except the "Milch case"), the defendants were also charged with another of the principal "occupation offenses": the looting or expropriation of property in violation of the laws of war. The third usual concomitant of German military occupation, which perhaps aroused the bitterest and most widespread condemnation during the war, was the wholesale execution of hostages under the guise of "pacification" of the occupied territory. The un-

[184] Transcript of proceedings, pp. 10454–10455.

lawful execution of hostages was the central charge in the "Hostage case" (*United States* v. *Wilhelm List*, Case No. 7), and was also involved in the "High Command case" (*United States* v. *Wilhelm von Leeb*, Case No. 12).

The fourth and largest category—"crimes against humanity," consisting of atrocities committed in the course or as a result of racial or religious persecutions—played a part in all 12 of the trials. Murderous "experiments," perpetrated in the name of medicine, had been inflicted on Jews, gypsies, and other unfortunate inmates of the concentration camps, as was developed in the "Medical," "Milch," and "Pohl" cases (Cases No. 1, 2, 4, respectively). The entire system of concentration-camp administration was explored in the "Pohl case." In the "Justice case" (Case No. 3) the Nazi judges and legal officials were accused of "judicial murder" by perverting the German legal system so as to deny to Poles, Czechs, and others the protection of law. Concentration-camp inmates were among the most miserable victims of the slave-labor program, as was disclosed in the "Krupp," "Farben," "Ministries," and "Pohl" cases. The notorious "final solution of the Jewish question," the objective of which was nothing less than the extermination of European Jewry, was the basis of the "Einsatz" case" (Case No. 9), and an important facet of the "Ministries case" (Case No. 11). The complicity of the military leaders in the "solution" was dealt with in the "Hostage" and "High Command" cases (Cases No. 7 and 12). In the "RuSHA case" (Case No. 8), the defendants were the principal officials in the so-called resettlement program, under which thousands of farmers in eastern Europe and the Balkans were robbed of their land for the benefit of German "settlers," and Germanic-looking children of Polish, Czech, or other eastern European parentage were torn from their parents and taken to the Reich for "Germanization."

In two cases, an entire count of each indictment was devoted to the charge that the defendants had committed crimes against humanity during the early years of the Third Reich, and before the outbreak of war in 1939. In the "Flick case" the defendants were accused of complicity in the forced "Aryanization" of Jewish industrial and mining properties. In the "Ministries case" a number of the defendants were charged with responsibility for the discriminatory laws and abuses, and the misery and atrocities resulting therefrom, under which German Jewry suffered during those years. In each case, the Tribunal dismissed the charge as outside its competence.

In addition to the foregoing categories of offenses, Control Council Law No. 10 also "recognized" as a distinct punishable offense [185] "membership in categories of a criminal group or organization declared criminal by the International Military Tribunal." The IMT did in

[185] Art. II, par. 1(d).

fact declare several of the Nazi organizations (notably the SS and the Leadership Corps of the Nazi Party) criminal in character, but at the same time stated that the declaration should not apply to "persons who had no knowledge of the criminal purposes or acts of the organization * * * unless they were personally implicated * * *. Membership alone is not enough to come within the scope of these declarations."[186] Thus, membership was not really made a distinct and self-sufficient crime, but rather was one of the ways by which an individual might be proved guilty of complicity in one or more of the four substantive categories of crimes just described.

As stated above,[187] it was determined during the early part of 1946 that the so-called "membership cases" would, for the most part, be handled as a part of the denazification program. The punishment of membership in these organizations (within the limits of the IMT declaration) was, therefore, only an incidental purpose of the Nuernberg trials. In the three cases entirely devoted to activities of the SS (the "Pohl," "RuSHA," and "Einsatz" cases), substantially all of the defendants were SS officers, and accordingly were charged with membership as well as with the specific offenses described in the other counts of the indictments. In three other cases (the "Medical," "Justice," and "Ministries" cases) a majority of the defendants were members of one or more of the criminal organizations, and were likewise indicted accordingly. In two additional cases (the "Flick" and "Farben" cases) the "membership" charge was relatively unimportant, and in the remaining four trials (the "Milch," "Hostage," "Krupp," and "High Command" cases) it played no part whatsoever.

Finally, in addition to "crimes against peace," "war crimes," "crimes against humanity," and the crime of "membership," both the London Charter and Law No. 10 made punishable "participation in a common plan or conspiracy." Indeed, the indictment in the first Nuernberg trial, drawn up under the provisions of the London Charter, utilized the conspiracy charge as the unifying element of the entire case. The IMT did not follow the prosecution down this road; it interpreted the concept very narrowly, and adopted a construction of the Charter under which conspiracies to commit "war crimes" or "crimes against humanity" were ruled entirely outside the jurisdiction of the Tribunal.

In these respects it seemed to me that the decision of the IMT was open to serious question.[188] Furthermore, the language of Control Council Law No. 10 differed in certain respects from that of the London

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[186] *Trial of the Major War Criminals, op. cit. supra,* Vol. I, p. 256.

[187] *Supra,* pp. 15–17.

[188] Mr. Henry L. Stimson has expressed the view that the principal defect in the IMT's judgment is the very limited scope which it allowed to the doctrine of conspiracy. See *The Nurnberg Trial: Landmark in Law,* published in "Foreign Affairs" for January 1947, p. 187. Quite possibly the IMT judgment can be explained by the hostility of the French (and probably Soviet) judges to the concept of conspiracy. See *Nuremberg Trials: War Crimes and International Law, op. cit. supra,* pp. 344–347.

Charter, and accordingly I decided to charge the defendants in three of the early Law No. 10 cases (the "Medical," "Justice," and "Pohl" cases) with conspiracy to commit the war crimes and atrocities specified in other counts of the indictment. The defense counsel in all three of these cases thereafter moved to strike the conspiracy charge, and on 9 July 1947 the judges of all the tribunals then constituted held a joint session to hear argument on the point. The prosecution's statement of its position did not prove persuasive, and shortly thereafter the tribunals hearing the "Medical," "Justice," and "Pohl" cases issued identical orders dismissing the conspiracy charges.

After these rulings, the conspiracy charge was included in the prosecution's indictments only in connection with "crimes against peace." Such conspiracies were expressly made punishable in both the London Charter and Law No. 10. But in all four of the cases where the defendants were accused of conspiracy to commit crimes against peace they were acquitted of this charge, on the ground that the evidence was insufficient to warrant convictions.

Form of the Indictments

The indictments were signed by me as Chief of Counsel for War Crimes,[189] and were brought in the name of the United States of America. The question whether or not the charges should be laid in the name of the United States presented some difficulties. The definition of the crimes to be punished and the authority to constitute tribunals to try persons so charged were contained in quadripartite enactment partaking of the nature of both statute and treaty. Accordingly, should not the charges have been brought in the name of the Control Council or of the four occupying powers? On the other hand, Control Council Law No. 10 (Art. III) delegated to each of the occupying authorities, within their respective zones, the right to arrest war crimes suspects and to determine who should be brought to trial.[190] Since an indictment is in essence a statement of charges against a designated person or group of persons, and since the selection of defendants was made under the authority of the American Zone Commander, it appeared appropriate to bring the charges in the name of the United States of America.[191]

The defendants were charged, however, with crimes "as defined in Control Council Law No. 10, duly enacted by the Allied Control Council on 20 December 1945".[192] The alleged connection of the accused

[189] Military Government Ordinance No. 7, Art. III, provided that the Chief of Counsel should "determine the persons to be tried by the tribunals and he or his designated representative shall file the indictments with the Secretary General."

[190] Subject to certain qualifications with respect to individuals wanted for trial in more than one zone or by more than one country.

[191] The indictments in the French Zone under Law No. 10 were, for parallel reasons, brought in the name of the French authorities.

[192] This was standard language in all 12 indictments.

with the crimes described in the indictments was invariably stated in the precise language of paragraph 2 of Article II of Law No. 10, e. g., in the "Flick case" it was charged in count one that the defendants were principals in, accessories to, ordered, abetted, took a consenting part in, were connected with plans and enterprises involving, and were members of organizations or groups connected with the crimes charged therein.[193] For reasons of law and policy, however, no defendant was ever charged with the commission of crime under the wording of clause (f) of that paragraph which, read literally, seemed to make it criminal to have held "high political, civil or military * * * positions in Germany or * * * in the financial, industrial or economic life" of Germany.[194] This clause applied only to "crimes against peace," and for this and other reasons it appeared to me improbable that it had been the actual intention of the Control Council to make the holding of a high position criminal *per se*. Much more probably, I believed, this clause was included in order to make it clear that the position held by a defendant should be given full consideration in determining the extent of his knowledge of, and participation in, the making and execution of policies, political, military, or economic as the case might be. Accordingly, the language of clause (f) of paragraph 2 was utilized in the indictments in the "Farben," "Krupp," "Ministries," and "High Command" cases (these being the only four cases in which crimes against peace were charged) only as descriptive of the status of the defendants, and not as part of the "charging language."

In some cases, the indictments were divided into counts corresponding to the categories of crime defined in Law No. 10. Thus, the "Medical," "Justice," and "Pohl" cases each contained four counts, of which the first charged conspiracy, the second war crimes, the third crimes against humanity, and the fourth membership in criminal organizations. In other cases the counts were based upon the nature of the acts charged. Thus, in the "Flick case" count one dealt with slave labor, count two with plunder and spoliation, count three with the "Aryanization" of Jewish property, count four with complicity in the crimes of the SS, and count five with "membership."

In most of the cases under Law No. 10 the defendants held important positions in the political, military, or economic field, and their responsibility was not that of direct participants in particular atrocities; rather they were accused of having prepared or distributed orders, or otherwise participated in the formulation or execution of general policies, which led to a large number of atrocities. For this reason, the indictments were specific with respect to the conduct of the defendants, but general with respect to the murders or other atro-

[193] This, likewise, was standard language in the indictments generally.

[194] As described above, this phrase was derived from J. C. S. 1023/10, *supra*, pp. 4–6. See also footnote 25, p. 5.

cities resulting therefrom. As was stated in the judgment in the "Justice case" (*United States* v. *Josef Altstoetter*, Case No. 3) :[195]

> No defendant is specifically charged in the indictment with the murder or abuse of any particular person. If he were, the indictment would, no doubt, have named the alleged victim. Simple murder and isolated instances of atrocities do not constitute the gravamen of the charge. Defendants are charged with crimes of such immensity that mere specific instances of criminality appear insignificant by comparison. The charge, in brief, is that of conscious participation in a nation-wide governmentally organized system of cruelty and injustice, in violation of the laws of war and of humanity, and perpetrated in the name of law by the authority of the Ministry of Justice, and through the instrumentality of the courts. The dagger of the assassin was concealed beneath the robe of the jurist. The record is replete with evidence of specific criminal acts, but they are not the crimes charged in the indictment. They constitute evidence of the intentional participation of the defendants and serve as illustrations of the nature and effect of the greater crimes charged in the indictment. Thus it is that apparent generality of the indictment was not only necessary but proper. No indictment couched in specific term and in the manner of the common law could have encompassed within practical limits the generality of the offense with which these defendants stand charged.

However, there was no hard and fast rule in this respect. In the "Einsatz case" (*United States* v. *Otto Ohlendorf*, Case No. 9), for example, the defendants were charged with direct responsibility for a long list of particular atrocities, all of which were duly set forth in the indictment, showing the place and date and describing the crime charged. In the "Ministries case" (*United States* v. *Ernst von Weizsaecker*, Case No. 11) a particular murder of a captured French general was charged and described in detail (count three, par. 28d).

Selection of Defendants

The determination of who should be tried in the American zone of occupation under Law No. 10 was the exclusive responsibility of the Chief of Counsel for War Crimes.[196] After the accused were brought to trial, their conviction or acquittal, and the severity of the sentences, were matters for the tribunal to decide. The Chief of Counsel had, needless to say, the responsibilities of an officer of the court, and was in somewhat the same position as a district attorney; but his role at the trial was that of an advocate, not a judge.

In determining whom to indict, however, I had to perform both investigative and semijudicial functions on my own responsibility. It was important not only that these decisions be informed, intelligent, and fair, but that they be made as expeditiously as possible. Legal considerations were, of course, dominant, but in addition one had to

[195] Transcript of proceedings, p. 10649.

[196] Acting, of course, under the authority and subject to command of the Military Governor.

act so as to avoid, so far as possible, even the appearance of either favoring or vengefully pursuing any individual or class, category, or group of individuals. To these ends I devoted a large share of my time and attention, up to the latter part of 1947.

It should be made perfectly clear that the individuals indicted under Law No. 10 were a small minority of those who, on the basis of the available evidence, appeared and probably could be proved to be guilty of criminal conduct. In the field of slave labor, for example, numerous private industrialists and government officials, in addition to those indicted and tried, were deeply implicated. Many government officials knew of, and participated to a greater or lesser degree in, the "final solution of the Jewish question," and many generals and other officers bore responsibility for the execution of commandos, commissars, Jews, and others, in addition to the handful who stood trial at Nuernberg. These statements are in no way related to the problem of "mass guilt" so-called; if—instead of the 161 who actually were convicted at Nuernberg—2,000 or even 20,000 could have been convicted, that is still a long way from 60 or 80 millions of Germans. But these circumstances do bring out the moral decay of German leadership, and show why the problems of *distribution* and *emphasis* were of such importance in discharging my responsibilities with respect to the selection of defendants. In my first report to the Deputy Military Governor (then Lieutenant General Clay) on 1 November 1946, I stated:

> We are planning a balanced program of trials of defendants who will represent all the major segments of the Third Reich. For working purposes, they have been divided into four categories: government officials; SS, police, and Party officials; military leaders; and bankers and industrialists.

This was in line with the IMT's finding that the responsibility for the wars and crimes of the Third Reich was not exclusively that of Hitler and the Nazi Party chieftains, but that:[197]

> Hitler could not make aggressive war by himself. He had to have the co-operation of statesmen, military leaders, diplomats, and business men. When they, with knowledge of his aims, gave him their co-operation, they made themselves parties to the plan he had initiated. They are not to be deemed innocent because Hitler made use of them, if they knew what they were doing. That they were assigned to their tasks by a dictator does not absolve them from responsibility for their acts. The relation of leader and follower does not preclude responsibility here any more than it does in the comparable tyranny of organized domestic crime.

Looking at the 12 Law No. 10 trials as a whole, it seems to me that 4 factors were basic in making the final selections of the individuals to be accused. First and foremost, of course, was the collection and analysis of evidence (both oral and documentary), and what the evidence showed concerning the activities of particular individuals. This may

[197] *Trial of the Major War Criminals, op. cit. supra,* Vol. I, p. 226.

be called the inductive process, in that the assemblage and study of the particulars shown by the evidence was the basis for general decisions as to what individuals and categories of individuals should be accused. Since it was a firm policy of OCCWC not to indict anyone unless there was substantial evidence available against him, the existence of such evidence was a *sine qua non* of the determination to include a particular name in an indictment. If such evidence had not been and apparently could not be found, the individual was not indicted; if such evidence was available, the individual was indicted unless a negative decision was indicated by virtue of some other factor, such as that the person was of minor importance and could or should be handled in the denazification proceedings or otherwise, or that the individual could more appropriately be tried in another zone or country, or that there were circumstances in mitigation so compelling that a trial would have served no useful purpose.

One might assume that the selection of defendants would be governed entirely by "what the evidence showed," but in fact the problem was not so simple as all that. The available "evidence" of all kinds was infinitely vast and varied, and we could not possibly scan more than a small fraction of it. It was necessary, therefore, to approach the problem of evidence collection with some preconceptions and according to a plan. In short, it was necessary to use *deductive* as well as *inductive* methods of investigation. Accordingly, all professional staff members were expected to familiarize themselves as rapidly as possible with the organization and functioning of the Reich and, especially, of that particular part of the Reich with which the staff member in question was most immediately concerned. In addition, a special section was set up to compile a sort of register or "Who's Who" of leading German politicians, civil servants, military men, business men, etc.[198] From these studies one could draw tentative *a priori* conclusions with respect to the *locus* of responsibility for the crimes and atrocities known to have been committed. It goes without saying that these conclusions were subject to constant revision and check as more evidence came to light. The deductive and inductive methods supplemented and complemented each other. Tentative conclusions reached by deduction from a general knowledge of the structure of the Third Reich provided a guide in approaching the formidable mass of detailed evidence. As the evidence was collected and analyzed, new and more accurate light was shed upon the general organization of German government and business which, in turn enabled us to draw up new and more precise conclusions and inferences.

The third factor was, of course, *availability*. A fairly large number of important war crimes suspects were not located until a year or more after the end of hostilities, and some have not even yet turned

[198] *Supra*, p. 15.

up. It was the task of the Apprehension and Locator Branch [199] to keep a register showing the location of all war crimes suspects who had been apprehended, and to keep the occupation authorities advised concerning those who were still "wanted."

War crimes suspects under arrest in the American zone were not all necessarily available for trial at Nuernberg, and some who were held in the other zones were nevertheless available to us. Law No. 10 contained provisions governing the transfer of war crimes suspects among the several occupying powers, and these were extensively utilized as between the United States, United Kingdom, and France. The British and French authorities both transferred to Nuernberg a number of the individuals who were tried there and OCCWC, in turn, recommended the transfer of a number of individuals to the British and French for trial. There was also a certain amount of interchange between Nuernberg and other European countries, such as Holland, Denmark, and Poland.

Finally, the number of individuals to be tried at Nuernberg (and, to a lesser extent, the composition of the group of accused) was affected increasingly by over-all policy and administrative factors—*time*, *staff*, *and money*. Important as the war crimes trials were originally intended to be in the over-all occupation program, they could not be allowed to grow out of proportion to other activities. Furthermore, for both legal and policy reasons, it was desirable that they be completed without unnecessary delay. It was best to hold the trials while the evidence was still fresh, and public interest in the actual court proceedings was certain to diminish rather than increase. Within the time practically available, the general public would undoubtedly approve a speedy procedure and short trials, but a different point of view might be expected to develop among the lawyers and especially the judges actually responsible for the proceedings. As matters worked out, all of the trials took considerably longer than I or my colleagues had estimated and this, of course, meant that fewer individuals were brought to trial.

As our studies and the collection of evidence progressed, and the probable identity of many of the defendants emerged, the question arose as to how the defendants should be grouped for purposes of trial. The general principle upon which this question was usually settled was the defendants should be grouped according to the sphere of activity in which they were primarily engaged. This principle, which greatly reduced the factual scope of each trial, thus promoting expedition, was applied with entire consistency in eleven of the twelve Law No. 10 trials; the defendants in each case were all concerned with medical affairs or judicial affairs, or belonged to a particular branch of SS activities, or were affiliated with a particular industrial com-

[199] *Supra*, pp. 40–41.

bine, or were leading military men. Only in the "Ministries case" (*United States* v. *Ernst von Weizsaecker*, Case No. 11) were there any departures, and even here there was a rational basis for the grouping, albeit affected by the administrative necessity of trying in a single proceeding a group of defendants whom we had originally planned to try in three proceedings.

The number of defendants in each of the cases was principally determined by the level of responsibility at which it was decided to draw the "bottom line." In some cases, however, the "level of responsibility" basis alone might have led to the inclusion of so many defendants that the proceeding would have become unwieldy; indeed, one governing consideration in several cases was the size of the defendants' dock in the particular courtroom which was to be used. Two of the six courtrooms could accommodate up to 24 defendants, and in these the "Medical," "Farben," "Einsatz," and "Ministries" cases were tried (in all of which there were 21 to 23 accused who actually stood trial), as well as the next largest case (the "Pohl case") in which there were 18 defendants. In the other four courtrooms, 15 or more defendants caused serious overcrowding in the well of the court (it should be borne in mind that an increase in the number of defendants automatically resulted in an increase in the number of defense counsel). Accordingly, in the cases which seemed to be destined for trial in one of the smaller courtrooms, the indictments named 16 defendants at most (in the "Justice case") and 12 or 14 as a rule, even though the available evidence might have justified the inclusion of others. Twelve or more defendants were, however, indicted in all but two cases; the reasons for the small number of defendants in the "Flick" and "Milch" cases were largely administrative.[200]

After the preparatory work had been thoroughly done, the final decisions as to who should be indicted presented relatively few difficult problems, except in the last two cases. The first Law No. 10 trial (the "Medical case"), for example, was built around the atrocious medical experiments in concentration camps, much evidence concerning which had come to light before the IMT. The surviving principal suspected perpetrators of these crimes were, for the most part, in American or British custody. By informal agreement with the British occupation authorities, it was decided that the medical suspects held by them would be transferred to Nuernberg, with a view to a single trial of all those who bore major responsibility, and this was done.

The same was done in the "Pohl case," with the purpose of trying in one group the chiefs and other leading officials of the economic and administrative division of the SS (the so-called "WVHA"), which constructed and supervised the operations of the concentration camps

[200] *Infra*, p. 78.

and utilized concentration-camp labor in mines and factories owned and operated by the SS. The head of the WVHA, SS Lt. Gen. Oswald Pohl, had been captured in the British zone, and he and several of his associates were made available by the British for trial at Nuernberg.

In the course of these conversations with the British authorities, they indicated to me their desire to try several leading German generals and SS officials in Italy for the so-called "Ardeatine Caves" massacre and other atrocities committed during the German occupation of Italy. In response to their request, Field Marshal Albert Kesselring (a prisoner of the United States) was turned over to them by us, as well as Himmler's former personal adjutant, SS Lt. Gen. Karl Wolff, who headed the German SS and police organization in Italy during the latter part of the war. Kesselring was subsequently tried and convicted [201] by a British court martial sitting in Italy, but Wolff was not brought to trial; he was recently tried before a denazification tribunal in the British zone and, according to newspaper reports, was sentenced to only four years' imprisonment, with credit for time spent in confinement since the end of the war, and is now at liberty.

The "Justice case" (Case No. 3) was another which had been planned nearly from the beginning. The very nature of the Third Reich was totally incompatible with any "law" worthy of the name, and German jurists bore a heavy share of the blame, both for what they did and what they failed to oppose, for the excesses of the dictatorship. The "Milch" and "Flick" cases (Cases No. 2 and 5), however, were not envisaged in our original planning. Field Marshall Erhard Milch, to be sure, was a very important figure, both as second man to Goering in the Air Ministry and as Speer's colleague in the Central Planning Board, which played a leading part in the slave-labor program. But there was no legal necessity for trying Milch by himself, and this was done chiefly because a newly arrived tribunal (No. II) was ready to hear a case, and no other case was far enough advanced for trial at that time (December 1946).

The "Flick case" was a much more valid entity. The "Flick Konzern" became as large as or even slightly larger than the Krupp enterprises. Both combines were dominated and largely owned by the men whose names they bore, and they were by far the two largest proprietary concerns in the Ruhr. Furthermore, Flick provided an interesting contrast to Krupp, in that he was not a hereditary tycoon, and was much more of a promoter and manipulator than were the more conservative armourers of Essen. He skated on thinner ice financially and politically, and truckled openly to Goering and Himmler.

[201] Kesselring was sentenced to death by the court martial, but on review the sentence was commuted to life imprisonment.

Nevertheless, a much more telling and significant proceeding would have resulted had the more important defendants in the "Flick" and "Krupp" cases [202] been grouped in a single case, together with other Ruhr iron-masters from the largest of the combines (such as Ernst Poensgen of the Vereinigte Stahlwerke) and other large concerns (such as Gutehoffnungshuette and Mannesmann). Evidence was available implicating these other firms in the "occupation offenses" (slave labor and economic spoliation), and several of the Ruhr leaders had assisted in Hitler's climb to power.

Such a case would have brought to the bar in a single judicial proceeding the masters of the Ruhr and leaders of German heavy industry. It was not done for two principal reasons. Because of the geographical location of the Ruhr, such a trial should logically have been held in the British Zone, and up to the spring of 1947 there was still some reason to anticipate the possibility that the British might try or participate in a trial of Krupp and other industrialists. More immediately, however, it would have taken many more months to prepare for a trial of such considerable scope. The "Flick case," in which no charge of war making was made, could be and was prepared for trial by the spring of 1947. The "Krupp case" was far more complicated, and did not get under way until the end of that year. By that time it had become clear that the British did not intend to proceed against the Krupps. However, the evidence against them in our possession appeared (and proved to be) compelling, and under all the circumstances it seemed to me wise to go ahead with the trial in Nuernberg.

The remaining industrial case—the "Farben case" (Case No. 6)—was part of our planned program from the outset. The I. G. Farben chemicals combine was not a proprietary company; like so many large American corporations, its stock was very widely distributed and there was no "controlling interest." It was a typical "management corporation," governed by the Vorstand (a management "cabinet" roughly equivalent to the executive committee of a board of directors and the principal corporate officers, rolled into one group). There were about twenty surviving Vorstand members and these, together with four other leading Farben officials, were all indicted on charges of war making, spoliation, and slave labor. Farben had had close relations, both commercially and in the field of industrial research and development, with the Standard Oil Company and other large American corporations, and the trial and judgment aroused great interest in the United States.

The "Race and Resettlement Division" ("RuSHA") and affiliated branches of the SS were a principal focus for practical application of

[202] For example, Friedrich Flick and Otto Steinbrinck from the "Flick case" and Alfried Krupp, Ewald Loeser, Eduard Houdremont, Erich Mueller, and von Buelow from the "Krupp case."

the Nazi racial myths, and this trial (Case No. 8), too, was projected from the start. Not so the third SS trial—the "Einsatz case" (Case No. 9)—which was not envisaged in the form it finally took until the spring of 1947. The "Einsatzgruppen" were special task units (each about 400 strong) of SS and police officers and men who accompanied the German armies in the course of the invasion of the Soviet Union, with the mission of liquidating all Jews, gypsies, political officials, and other proscribed categories. The leader of one of these groups, SS Major General Otto Ohlendorf, was a witness in the trial before the IMT, and was held at Nuernberg. It had been planned to try Ohlendorf together with other high-ranking officials of the security, intelligence, and police branch of the SS (RSHA), but after investigation it developed that very few such top-ranking officials were physically available for trial.[203] In the meantime, numerous other commanders and subordinate officers of the Einsatzgruppen were apprehended, more of their documentary reports were found, and it was decided to prepare for a trial dealing solely with the activities of these groups. From this plan the "Einsatz case" developed, with Ohlendorf and 23 others as the defendants.

The "Hostage case" (Case No. 7), on the other hand, developed rapidly from the revelations before the IMT. The German military policy of endeavoring to "pacify" occupied countries by the ruthless slaughter of thousands of hostages was applied with particular severity in the occupied Balkan countries—Yugoslavia, Albania, and Greece. Documentary proof that these killings were carried out pursuant to orders emanating from the highest levels of the Wehrmacht came readily to hand, and several of the responsible German military leaders—Field Marshals List and von Weichs and General Rendulic—were in American custody. These three and nine other German generals, all of whom held command or important staff assignments in the Balkans, were indicted for numerous and flagrant violations of the laws of war in the first of the two military cases tried at Nuernberg under Law No. 10.

The indictments in the cases described above—Cases No. 1 to 10, inclusive—were all filed during the first 10 months of OCCWC's existence.[204] Each of these 10 cases was a part of a "program" or "schedule" of trials to be held under Law No. 10 which had been submitted by me to and approved by the Deputy Military Governor in the spring of 1947. A tentative plan for a series of 15 to 18 trials, in which approximately 225 individuals would be accused, had been submitted by me to General Clay on 14 March 1947. A modified program of 16 trials (involving approximately 220 defendants) was sub-

[203] Many of them were known to be dead and others could not be located.

[204] The indictment in the "Krupp case" (Case No. 10) was the last of these filed, under date of 16 August 1947.

mitted on 20 May 1947, and was approved by him on 9 June 1947. The cases commenced up to and including the "Krupp case" (August 1947) comprised 10 of these 16 cases, and in these 10 cases 150 individuals were named as defendants.

By the late summer of 1947, however, it clearly appeared that it would be difficult if not impossible to try all six of the remaining cases on the schedule. These six included the principal military case, in which a dozen or more German field marshals, generals, and admirals were to be indicted for war making, violations of the laws of war, and atrocities in occupied countries; a smaller military case involving the responsibility of both army and SS generals for the mistreatment of prisoners of war; a case against the directors and principal officers of the Dresdner Bank involving economic spoliation and other offenses; a trial of a dozen or more leading government ministers in the economic field for war making, slave labor, and economic spoilation; a trial of the chiefs and other important officials in the German Foreign Office; and a trial of other cabinet ministers and government officials in the Reich Chancery and in the fields of education and propaganda. Several of these cases were in a fairly advanced state of preparation, but nevertheless it was clear by the end of August 1947 that budgetary and time limitations, and particularly the difficulty of obtaining enough additional judges to try six more cases, would require that the balance of the program of trials be scaled downwards.

Accordingly, on 4 September 1947 I recommended to General Clay that the six cases be reduced to not less than two and not more than four, by a process of merger and by the elimination of a number of the less important defendants. The two military cases could readily be and were promptly merged.[205] It was likewise a simple matter to combine the two proposed cases involving the government officials of the Foreign Office, the Reich Chancery, and other ministries. The inclusion of the economic ministers would broaden the scope of the case considerably, and the inclusion of charges relating to the Dresdner Bank would complicate the case still further.

Upon inquiry to the War Department in Washington, it developed that six more judges (enough for two trials) could probably be obtained, but that it would be very difficult to recruit more than that number. At the same time, a thorough review of the evidence relating to the Dresdner Bank revealed that a great deal of additional work would have to be done in order to assemble and evaluate the evidence against the directorate of the Bank as a group.

Accordingly, it was determined to consolidate the six remaining cases into two, of which one would be concerned solely with military

[205] The SS officers who would have been indicted in the "prisoner-of-war case" were eliminated as defendants, except for one (SS Lt. Gen. Gottlob Berger) who was included as a defendant in the "Ministries case" (Case No. 11), charged with numerous offenses including the abuse of prisoners of war.

affairs, and the other with the principal government ministers (other than those tried by the IMT) in both the political and economic fields. Evidence relating to one of the principal directors of the Dresdner Bank (Karl Rasche) was available implicating him heavily in economic spoliation, and accordingly he was included as a defendant in the case, together with two leading SS generals (Berger and Schellenberg), who had worked closely with the government ministers. The indictments in these two last Nuernberg cases were filed in November 1947; the case involving the government ministers (21 defendants) was designated the "Ministries case" (*United States* v. *Ernst von Weizsaecker*, Case No. 11), and the military leaders (14 in number) were tried in the "High Command case" (*United States* v. *Wilhelm von Leeb*, Case No. 12). The addition of these two cases brought the total number of individuals indicted under Law No. 10 to 185.

The consolidation of these six cases into two, with the reduction in the number of defendants from approximately 70 to 35, presented numerous difficult questions as to which individuals should be included as defendants and which eliminated. Furthermore, the selection of defendants for the "High Command case" (Case No. 12) also gave rise to the only occasion upon which my plans as to the inclusion of particular defendants were disapproved by General Clay. The evidence upon which the charges in this case were based was largely contained in captured German military documents. These documents were filed according to the headquarters (army group, army, corps, division, etc.) which had issued or received the document in question. The documents in each file, accordingly, might contain evidence relating to any senior officer of the particular headquarters concerned, or who had transmitted a document to that headquarters. In fact, much apparently incriminating evidence came to light concerning Field Marshals von Rundstedt, von Brauchitsch, and von Mannstein, who were in British custody, as well as Field Marshals von Leeb, von Kuechler, and other high-ranking generals in American custody. It was my recommendation that all the implicated generals, regardless of whether they were in American or British custody, should be tried in a single proceeding, preferably before a tribunal established jointly by the British and American authorities, as contemplated by Article II (c) of Military Government Ordinance No. 7. Should the British not desire to participate in such a trial, it was my recommendation that the three field marshals in British custody should be transferred to Nuernberg, and tried (along with those in American custody) before a Nuernberg tribunal composed in the usual manner. On this later basis, they would have been tried in the "High Command case."

These recommendations were disapproved, and instead I was directed to try only the field marshals and other officers already in American custody, and to transmit (in August 1947) the evidence

which appeared to incriminate Rundstedt, Mannstein, and Brauchitsch to the British authorities.[206] The following year, the British authorities announced their intention to try the three field marshals, but the preparations were time-consuming, and von Brauchitsch died early in 1949. Thereafter, a medical board concluded that von Rundstedt was physically unable to stand trial,[207] and he was set at liberty. The trial of von Mannstein is presently scheduled to begin on 23 August 1949, 18 months after the opening and 9 months after final judgment in the "High Command case." During this period, the British press has contained much criticism of the British authorities for the tardiness of the proceedings against the three field marshals, and the von Mannstein case now bids fair, most unfortunately, to become a political issue.[208]

At no time was any pressure or improper influence brought to bear on me in connection with the selection of defendants. There was, to be sure, a great deal of interest on the part of the press in the question whether or not Fritz Thyssen would be indicted. Thyssen had been one of Hitler's strongest supporters among the leading German industrialists prior to and at the time of the latter's rise to power, and contributed large sums of money to the Nazi Party. But his relations with Hitler cooled during the early years of the Nazi regime, and he fled Germany upon the outbreak of the war and (as a member of the Reichstag) cast his vote by telegraph against the war with Poland. Several years later he was apprehended by the Germans in France, and he spent the rest of the war in a concentration camp. There was no evidence that he was in any way implicated in war crimes or atrocities and only under the most all-embracing theory of conspiracy could one have accused of war-making a man who, long out of favor, became a voluntary exile in protest against the war. A reactionary, authoritarian man no doubt Thyssen was, but on the available evidence his criminal guilt under international law, if any, was so attenuated that, in my judgment, his indictment would have been a serious mistake, and his selection as a defendant from among others against whom the evidence was far stronger, a preposterous error.

After the indictments had been filed, however, the selection of defendants was not infrequently a subject of criticism, especially in the closing stages of the trials and with respect to the last two cases (the "Ministries" and "High Command" cases). For the most part this criticism was confined to the "nationalist" wing of the German press and periodical literature, but there were occasional murmurings

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[206] Evidence which had come to hand regarding Gen. Adolf Strauss, a British prisoner, was simultaneously transmitted.

[207] The same conclusion was reached in the case of General Strauss.

[208] [Since this report was written, the Mannstein trial was concluded (19 December 1949). The defendant was convicted on 9 out of 17 charges, and sentenced to 18 years imprisonment, later reduced on review to 12 years.]

in England and the United States questioning the trials of industrialist and generals.[209] The individual case which proved most controversial was that of the diplomat Ernst von Weizsaecker, who had been appointed State Secretary (Staatssekretaer) in the German Foreign Office simultaneously with Ribbentrop's appointment as Foreign Minister. Von Weizsaecker was a personable and well-educated individual who had made many friends abroad during his service in Switzerland and Norway and at the Vatican.

Diplomats such as von Weizsaecker, field marshals such as von Leeb, von Weichs, and List, and business leaders such as Loeser and Schmitz, were men of the highest standing in Germany; they were not Nazis in any party or organizational sense, and no doubt they were repelled by some facets of the Nazi regime. The "respectability" and "nonpolitical" appearance of these men no doubt lies at the root of the protests which were raised against their indictment and trial. It proved exceedingly difficult to "get it across" to the Germans (and, indeed, to some others) that it was not the purpose of Nuernberg to try *Nazis* who might or might not also be criminals, but to try suspected *criminals* who might or might not also be Nazis.

Those Germans who criticized the trials of generals, diplomats, and industrialists sometimes charged that we were "persecuting" these "respectable" groups and overlooking notorious and highly placed Nazi Party officials, such as the Gauleiters. It so happens that most of the Gauleiters committed suicide, disappeared, or were tried elsewhere, and very few would in any event have been available for trial at Nuernberg.[210] But this was coincidental rather than determinative, and the same misconceptions as to the objective of the trials lie at the root of this complaint. The Gauleiters were mostly Nazi fanatics, and their misdeeds were many, but what they did was done inside Germany, and the worst of what they did was done before the war.[211] Were these acts crimes under international law? In my view many of them were, but all three of the efforts made at Nuernberg to stamp as criminal under international law persecutions within Germany prior to the war failed on legal grounds,[212] and the charges against the Gauleiters would, in general, have been weaker than those brought against such top Nazi government officials as Darre, Lammers,

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[209] There was also, of course, a vocal minority which was opposed to the entire concept of war crimes trials.

[210] In fact, three Gauleiters were tried at Nuernberg: Streicher and Sauckel by the IMT, and Bohle in the "Ministries case" (Case No. 11). In addition, a number of Reichsleiters, such as Rosenberg, Speer, Darre, and Dietrich were tried at Nuernberg.

[211] I am referring here, of course, to the leaders of the Gaus within Germany, not to those in occupied countries.

[212] These efforts were made in the first Nuernberg trial, in the "Flick case" (Case No. 5), and the "Ministries case" (Case No. 11). In the "Justice case" and the "Einsatz case," where the question was not directly involved, the reasoning and language of the judgments nevertheless indicates that such acts may, under certain circumstances be crimes against international law. See the transcript of proceedings in the "Einsatz case," pp. 6767 and 6768, and in the "Justice case," pp. 10641–10645.

Stuckart, and Dietrich, to say nothing of Goering, Streicher, Frick, and others who (though convicted of other terrible crimes) were *not* found guilty on the basis of prewar political and racial persecutions.

At all events, that is how matters appeared to me. The responsibility for the selection of defendants in the Nuernberg trials under Law No. 10 was mine alone, and the blame for any mistakes that were made is equally mine. I cannot now state better than I did last year (in my interim report to Secretary Royall) the principles which I endeavored to follow:[213]

> * * * one of the first and most important responsibilities of my office was to determine, in the light of the best available information, where the deepest individual responsibility lay for the manifold international crimes committed under the aegis of the Third Reich. It should be emphasized that the Nurnberg trials have been carried out for the punishment of crime, not for the punishment of political or other beliefs, however mistaken or vicious. Consequently, in the selection of defendants, the question whether a given individual was or was not a "Nazi" in a political or party sense has not been governing. No one has been indicted before the Nurnberg Military Tribunals unless, in my judgment, there appeared to be substantial evidence of criminal conduct under accepted principles of international penal law.
>
> Nor would it have been fair or wise to favor or discriminate against any particular occupation, profession, or other category of persons. To preserve the integrity of the proceedings, it was necessary to scrutinize the conduct of leaders in all occupations, and let the chips fall where they might.

[213] *Infra,* Appendix A, p. 113.

THE TRIALS

It is generally acknowledged, among symphony conductors and trial lawyers alike, that the vital work is done before the show begins. Gesticulate and exhort as the conductor may during a concert, the quality of the performance will be largely determined by the caliber of the players he has selected, and the sensitivity and unity of purpose that he has imparted to them in rehearsal. Orate and emote as the trial lawyer may in open court, the impact of his case is more likely to be governed by the volume, quality, and organization of the evidence at his command when the trial begins. These truisms proved as valid in the Palace of Justice at Nuernberg as on Foley Square in Manhattan.

Procedure

Indeed, they were especially true at Nuernberg where the prosecution's case usually rested primarily on documents assembled prior to the trials and only secondarily on the testimony of witnesses. Few of the defendants committed atrocities with their own hands, and in fact they were rarely visible at or within many miles of the scenes of their worst crimes. They made plans and transmitted orders, and the most compelling witnesses against them were the documents which they drafted, signed, initialed, or distributed. The bulk of these documents were available in each case by the time the indictment was filed, and relatively few came to hand thereafter. This is not to belittle the importance of the court proceedings, or the opportunities for effective advocacy which they presented to prosecution and defense counsel alike. But these considerations do help to explain why so few court sessions were used by the prosecution in comparison to those devoted to the defense, which usually had to resort to other and more time-consuming methods in its endeavors to meet the prosecution's documentary case.

The general course of events at the trials was prescribed by Article XI of Military Government Ordinance No. 7, which in turn was adapted from (though not identical with) Article 24 of the London Charter. The practice was to serve the indictments on the defendants in the presence of the Marshal of the Tribunals and officials of the Defense Information Center, who simultaneously ascertained the wishes of the defendants with respect to counsel, and offered general advice and assistance. Ordinance No. 7 provided (Art. IV) that "a

reasonable time" should elapse between service of the indictment and commencement of the trial, and the tribunals by rule (Rule 4) prescribed that this period should be not less than 30 days. As matters worked out, the period was usually considerably longer than 30 days, and gave the defendants ample time and opportunity to select counsel and embark upon the preparation of their defense.

During this period, too, the defendants were formally arraigned before the Tribunal, which recorded their pleas of "not guilty" (in fact they were invariably "not guilty"), and ascertained that each defendant had had opportunity to read the indictment and had procured counsel. Often other procedural matters were taken up before the Tribunal at the conclusion of the arraignment, and customarily the prosecution at that time agreed to make available to defense counsel most of the documents which the prosecution planned to offer in evidence in support of its affirmative case. A large proportion of these documents were usually turned over to the defense soon after the arraignment, and the balance as soon as it was administratively feasible. Often the prosecution also made available large amounts of other documents which it did not plan to use in the direct case. As a rule, the prosecution withheld from the defense only such documents as it planned to reserve for use in connection with cross-examination of the defendants.

The trials began with an opening statement on behalf of the prosecution which undertook to outline comprehensively the nature of the evidence in support of the charges in the indictment, with numerous illustrative quotations from the documents to be offered. Thereafter, the prosecution proceeded to offer the evidence in support of the charges. The documents to be offered were assembled in "document books," in each (or each series) of which the documents relating to a particular subject or defendant were collected. In offering each document, prosecution counsel would briefly describe it and state the purpose for which it was offered. In this respect the practice of the tribunals varied; some wished an extremely short statement and others a slightly more comprehensive description of the contents. Most of the documents in the books had been in the hands of defense counsel for some time, and copies of each document book had been given them a day or more prior to its offer in court. If defense counsel wished to challenge the authenticity or relevancy of a document or correct the translation, they would make their objections or comments at the time the document in question was offered. However, if they wished to controvert the import of the documents by other evidence, they were required to wait until the presentation of the defense case.

During the prosecution's direct case, its witnesses were also heard. As a rule, they were not numerous. In some cases, testimony was offered by the prosecution in the form of affidavits, and these were

usually accepted by the tribunals subject to the right of the defense to cross-examine the affiants if they so desired. Some of the tribunals preferred to hear cross-examination of the prosecution's affiants at the close of the prosecution's case, while others preferred it to be done during the defense case.

At the conclusion of the prosecution's case in chief, the defense usually requested a long recess for further preparation of their own case in chief, and the tribunals customarily ordered a somewhat shorter recess than that asked for, varying, according to the circumstances, from 2 to 6 weeks. In some trials the evidence for the defense was offered defendant by defendant, and in others defense counsel divided up the presentation according to subject matter. Ordinarily, the defendants called many more witnesses than did the prosecution, and their documentary evidence contained a very large number of affidavits. These affidavits, like those of the prosecution, were received by the tribunals subject to the prosecution's right to cross-examine the affiants, but in practice the prosecution usually waived cross-examination of all but a few of the affiants. Documents and affidavits offered by defense counsel were translated for them by the Language Division of OCCWC, and were assembled into document books by the Defense Information Center. As a rule the defendants themselves took the witness stand to testify in their own defense (following Anglo-Saxon practice, they were allowed to testify under oath but could not be required to take the stand against their will). In the "Krupp case" (*United States* v. *Alfried Krupp*, Case No. 10), however, none of the defendants took the stand to meet the prosecution's charges, and in a few other trials one or two of the defendants likewise abstained.

At the conclusion of the defense case, the prosecution had an opportunity to present rebuttal testimony and documents, which required only a few days at most. Thereafter (usually following a recess of a week or more) the closing arguments for both prosecution and defense were presented. Under Ordinance No. 7 as amended,[214] the tribunal determined the order in which these closing arguments should be made. There followed the statements of the defendants themselves and, within a specified period thereafter, final briefs for both sides were filed. After such a period as the tribunal required for preparation thereof, judgment was delivered and the sentences pronounced.

For the most part, the witnesses called by the prosecution were former inmates of concentration camps, victims of the slave-labor program, and others who could testify on the basis of first-hand knowledge to the atrocities and abuses charged against the defendants. Upon rare occasions, Germans who had themselves been convicted of or were suspected of having committed war crimes appeared as prose-

[214] By Military Government Ordinance No. 11 (17 February 1947), Art. III.

cution witnesses;[215] defense counsel, however, made use of such witnesses with great frequency. Likewise, a few highly qualified specialists of varying nationalities appeared as expert witnesses for the prosecution. Thus, the distinguished German medical professor Leibbrandt (of the University of Erlangen) was called in the "Medical case" to testify to the effect of the Nazi dictatorship on the German medical profession and medical standards. In the same case, the well-known American physician Dr. Alexander C. Ivy, vice president of the University of Illinois, gave technical medical testimony, and also explained American medical practice with respect to experimentation on human beings. In the "Farben case" an American chemical expert (Dr. Nathaniel Elias) appeared, and in both the "Farben" and "Krupp" cases Brig. Gen. (ret.) J. H. Morgan, who had been a leading member of the British component of the Allied Control Commission in Berlin following the First World War, testified concerning various historical matters within his special sphere of knowledge.

In connection with the testimony of the last three witnesses named, the defense requested that certain of the defendants themselves should be allowed to cross-examine the witnesses. Despite the novelty of this procedure, it appeared fair and suitable to the special circumstances of the situation, and the tribunals granted permission for this to be done. In the "Medical case," for example, Dr. Gerhard Rose (perhaps the most distinguished scientist among the defendants) and two other defendants cross-examined Dr. Ivy at length.

In order to shorten the proceedings, the prosecution used affidavits instead of oral testimony whenever possible. Such matters as the *curriculum vitae* of the defendants, organization charts of ministries and other government agencies, and explanations of the functioning of quasi-governmental industrial bodies were usually presented in affidavit form subject, of course, to the right of the defense to call the affiants for cross-examination. A comparatively small number of affidavits on more controversial matters were also introduced. The defense, however, utilized affidavits in great quantity on a very wide variety of subjects, but in order that the court proceedings should not be unduly prolonged the prosecution waived cross-examination except in the most important instances.

In three of the Nuernberg trials the witnesses and affiants were so numerous that the tribunals themselves were unable to hear all of the witnesses, and had to appoint commissioners for this purpose. These were the "Farben," "Krupp," and "Ministries" cases (Cases No. 6,

[215] Thus, SS Major General Ohlendorf, convicted and sentenced to death in the "Einsatz case" (Case No. 9), appeared as a rebuttal witness for the prosecution in the "High Command case" (Case No. 12), to testify to his relations with the headquarters of the German Eleventh Army, to which Ohlendorf's group was attached. Charges occasionally made in the German press that the prosecution had given witnesses such as Ohlendorf assurances of favored treatment are, of course, entirely without foundation. It was the prosecution's firm policy that neither threats nor promises would be made for such purposes.

10, and 11, respectively). Upon the conclusion early in 1948 of the "RuSHA case" (Case No. 8), before Tribunal No. I, Judge Crawford (who had been a member of that tribunal) was appointed as the Chief of the Commissioners for the Tribunals. Judge Crawford, assisted by several associate commissioners, took testimony from then until the conclusion of the court proceedings in the "Ministries case" in the fall of 1948. The commissioners had no power to rule on questions of evidence, but certified the transcript of proceedings before them to the tribunals.

In three cases, the defense made special requests for access to files of captured documents, and in all three cases the requests were granted in substantial part. In the two military cases (the "Hostage" and "High Command" cases, Cases No. 7 and 12), however, the files of captured documents were in Washington, and not available in Germany. The problem was solved in each case by sending from Washington to Nuernberg numerous files of documents (which filled many packing cases) requested by defense counsel, for inspection by them. If, as the result of such inspection, they wished to offer any particular documents in evidence, photostatic copies were furnished them for this purpose. In the "Ministries case" the problem was simpler, as the files of the German Foreign Office were available at Berlin, and upon request defense counsel were given access to and allowed to select such documents as they desired.

On evidentiary questions and other similar matters, the general nature of the Nuernberg procedure was a blend of continental and common law practice. Thus, as is usual in continental law, hearsay was much more freely admitted than in common law trials, and the defendants were permitted to make statements not under oath and not subject to cross-examination. But numerous fundamental doctrines and practices of Anglo-Saxon criminal law—such as the presumption of innocence, the rule that a defendant must be found innocent unless proved guilty beyond a reasonable doubt, and the practice that it is primarily the advocate's responsibility and not that of the tribunal to elicit testimony from witnesses—were applied at Nuernberg, and in general it may be said that the practice was more similar to that of the common law than continental law. Procedural and evidentiary rules were debated and determined as they arose, and rapidly a genuine "international procedure" was developed, which will well repay examination and exposition in published form.

Outcome

The success of a judicial process is not to be measured in terms of convictions and sentences alone, and this was particularly true at Nuernberg. The purpose of a criminal trial is to do justice, and no conscientious prosecutor desires to be a participant in the conviction

of a man about whose guilt there is substantial doubt. The purpose of the information given below about the results of the trials is, accordingly, informative only, and is in no way intended as a measure of the success or failure of the Nuernberg program.[216]

Of the 185 individuals who were indicted in the 12 trials under Law No. 10, only 177 were finally adjudged guilty or innocent. Following service of the indictments, four defendants committed suicide: one each in the "Justice," "Hostage," "Einsatz," and "High Command" cases (Carl Westphal, Lt. Gen. Franz Boehme, SS Maj. Emil Haussman, and Gen. Johannes Blaskowitz, respectively). Four other defendants were physically unable by reason of illness to present their defense, and were severed from the proceedings: one each in the "Justice," "Farben," "Hostage," and "Einsatz" cases (Karl Engert, Max Brueggemann, Field Marshall Maximilian von Weichs, and SS Brig. Gen. Otto Rasch, respectively). Of the 177 who actually stood trial, 35 were acquitted and 142 were convicted on one or more counts of the indictments.

Of the 142 convicted, 26 were originally sentenced to death—7 in the "Medical case" (Case No. 1), 4 in the "Pohl case" (Case No. 4) and 14 in the "Einsatz case" (Case No. 9). In a supplemental judgment, the tribunal (No. II) which heard the "Pohl case" (Case No. 4) reduced the sentence of one defendant (SS Maj. Gen. Georg Loerner) to life imprisonment, and on review of the sentence the Military Governor (General Clay) reduced still another death sentence (that of SS Maj. Karl Sommer) to life imprisonment. Accordingly, in the final outcome 24 death sentences were pronounced and confirmed. Of these, the seven pronounced in the "Medical case" were carried out (following the denial by the United States Supreme Court of a petition for habeas corpus filed there on behalf of the defendants) in 1948. The 16 other condemned men are still awaiting execution at Landsberg Prison.[217]

Of the 118 defendants convicted but not condemned to death, 20 were sentenced to imprisonment for life.[218] Of the other 98, 16 were given sentences of less than 4 years. Eleven of the sixteen were deliberately given sentences equal to or less than the time they had already spent in confinement awaiting trial, and were released immediately after the rendition of judgment. The other five received sentences of 2½ years or less which, with credit for time already served awaiting trial, meant that they had less or little more than a year still to serve at Landsberg, and this was also true of the two defendants who received 4-year terms.

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[216] See Appendix B, chart titled "Statistical Table of the Nuremberg Trials," p. 371.

[217] See *Infra*, pp. 97–98.

[218] This figure includes the life sentence of Karl Sommer in Case No. 4 (reduced from death), but does not include the life sentence originally imposed in the same case on SS Lt. Col. Max Kiefer, which by supplemental judgment the tribunal reduced to 15 years.

Accordingly, 80 defendants in all received prison terms of from 5 to 25 years duration, as shown by the following table:

Length of term (years)	*Number of defendants*
25	3
20	14
15	12
12	4
10	19
9	2
8	3
7	12
6	5
5	6

It will be seen that three-quarters of the defendants received sentences of 7, 10, 15, or 20 years, and that the average sentence was approximately 10 years in length.

On the whole, it was apparent to anyone connected with the entire series of trials under Law No. 10 that the sentences became progressively lighter as time went on. Defendants such as Darre, Dietrich, and Stuckart in the "Ministries case" (Case No. 11) who, although convicted under two or more counts of the indictment of serious crimes, received very light sentences in April 1949, would surely have been much more severely punished in 1946 or 1947. No doubt a number of factors played a part in this trend toward leniency, including waning interest on the part of the general public and the shift in the focus of public attention resulting from international events and circumstances.

The great majority of the convictions in the trials under Law No. 10 were based upon charges relating to war crimes and crimes against humanity, involving atrocities and offenses such as slave labor, economic spoliation, the killing of hostages, and persecution and extermination of Jews, and other racial, religious, or national groups. No defendant was convicted of conspiracy, and only 5 of the 52 defendants tried for war-making were convicted. In the "Farben," "Krupp," and "High Command" cases all the defendants had been charged with crimes against peace, and all were acquitted. In the "Ministries case" 17 defendants were so charged, of whom 5 only were convicted. Clearly, it was in connection with the charge of crimes against peace that the prosecution's views met with the least measure of acceptance by the tribunals. In this connection, in retrospect it appears to me that I committed a serious tactical error in not including the charge of war-making in the "Milch case" (Case No. 2).[219] In view of Milch's close association with Goering and his attendance at important Hitler war conferences, the proof in support of such a charge against Milch

[219] *Supra*, p. 67.

could have been quite simply and expeditiously offered and a clear-cut issue presented for decision in the very first judgment under Law No. 10. It is possible (though by no means certain) that Milch's conviction on such a charge (had it been obtained) would have been an influential precedent in the subsequent trials.

As explained heretofore,[220] the charge of membership in organizations declared criminal by the IMT played a relatively minor part in the Nuernberg proceedings under Law No. 10. In four of the cases (the "Milch," "Hostage," "Krupp," and "High Command" cases) none of the defendants were members of such organizations. In the other 8 cases, a total of 87 defendants were charged and tried on this ground.[221] Seventy-four were convicted. As to the 13 who were acquitted, the tribunals held either that the fact of membership had not been sufficiently established, or that the membership proved did not fall within the categories specified by the IMT. Of the 74 defendants convicted on the membership charge, 10 were convicted on this charge alone, 1 each in the "Medical," "Justice," and "Ministries" cases (SS Senior Colonels Helmut Poppendick, Josef Altstoetter, and SS Lt. Gen. Ernst Bohle, respectively), two in the "Einsatz case" (SS Captain Ruehl and SS Lieutenant Graf), and five in the "RuSHA case" (SS Senior Colonels Meyer-Hetling, Schwarzenberger, Ebner, Tesch, and SS Colonel Sollmann). The sentences imposed in these 10 cases show little consistency; Poppendick and Ruehl were sentenced to ten and Altstoetter and Bohle to five years imprisonment, each, but Graf and all five of the SS colonels in the "RuSHA case" were released immediately on the basis that the time they had spent in confinement awaiting and during trial was a sufficient punishment.

For the future and for the development of international law, the conclusions and reasoning of the judgments are, of course, far more important than the sentences. In the booklet attached hereto as Appendix B, I have sketched the reasoning in each of the 12 judgments with substantial illustrative quotations from the opinions,[222] and have set forth in summary form my views as to the significance of these decisions in the field of international jurisprudence.[223] I have nothing further to add here to what is said therein, except for some general observations in the conclusion of this report.[224]

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[220] *Supra,* pp. 69–70.

[221] In fact 89 were so charged, but two of these were the defendants named in the "Einsatz case" who were not finally judged (one suicide and one severed on account of illness).

[222] *Nuremberg Trials: War Crimes and International law, op. cit. supra,* pp. 227 to 335.

[223] *Op. cit. supra,* pp. 336–347 and 352–355.

[224] *Infra,* pp. 103–112.

DEACTIVATION PROBLEMS

Court proceedings at Nuernberg were concluded on 14 April 1949, and the OCCWC was formally deactivated on 20 June 1949. The Central Secretariat, however, is still in existence in order to route and receive petitions and other papers relating to clemency pleas arising from the last Nuernberg judgment (in the "Ministries case," Case No. 11), as well as to handle the disposition of court archives, etc. Dr. Howard H. Russell is continuing to act as Secretary General (as well as General Secretary of the IMT), and will, no doubt, himself submit a final report when these activities are concluded.[225]

The mission of OCCWC as an agency for the indictment and prosecution of war crimes suspects has, accordingly, been completed. There are, nonetheless, several problems and situations arising out of OCCWC's activities which remain to be dealt with.

Unfinished Business

As has heretofore been stated,[226] the individuals who were actually tried at Nuernberg were selected from among numerous other war crimes suspects against whom there was ample evidence to warrant indictment. For the most part, those who were not named as defendants occupied less important positions and bore a smaller share of the responsibility for the crimes and atrocities of the Third Reich than those who were put on trial. To this, however, there are certain exceptions. In the selection of defendants for the "Ministries case," for example,[227] it was necessary to eliminate as defendants a number of former high-ranking Reich officials who were closely connected with the program for extermination of Jews known as the "final solution of the Jewish question." Furthermore, there were several individuals who would have been indicted at Nuernberg but for the fact that at the time the indictments were filed it was believed they would be transferred to the custody of and tried by one of the countries formerly occupied by Germany. Owing to developments in the international situation, a number of these transfers did not take place, and

[225] [The Secretariat was terminated 15 November 1949. Residual functions were transferred to the Office of the United States High Commissioner for Germany.]

[226] *Supra*, pp. 73–75.

[227] *Supra*, pp. 81–85.

the individuals in question have never been brought to trial at all.[228]

Furthermore, five individuals were indicted at Nuernberg but never tried, of whom four survive.[229] Of these four, however, Gustav Krupp von Bohlen (indicted in the first Nuernberg trial before the IMT) undoubtedly will never be physically fit to stand trial,[229a] and Max Brueggemann (indicted in the "Farben case") is not a war-crimes suspect of major importance. But Karl Engert (indicted in the "Justice case") and Field Marshal Maximilian von Weichs (indicted in the "Hostage case") should certainly stand trial if in the future their physical condition permits. Engert was Chief of the Penal Administration Division and the Prison Inmate Transfer Division of the Reich Ministry of Justice and a vice president of the notorious Peoples' Court, as well as a senior colonel in the SS. Von Weichs was the commander in chief of all German forces in the Balkans from 1943 to 1945, and in that capacity was the commanding officer of Generals Rendulic, Felmy, Lanz, Dehner, von Leyser, and Speidel, all of whom were convicted and sentenced to long prison terms for transgressions of the laws of war during the German occupation of Yugoslavia, Albania, and Greece, including in particular the indiscriminate slaughter of hostages.

It is my belief that such individuals should be brought to trial on criminal charges before German tribunals. The offenses with which they would be charged are not such as can be appropriately dealt with by the denazification tribunals. Nor would it be wise, at this late stage, to constitute additional tribunals under Control Council Law. No. 10. It is true that the prevailing trend and climate of political opinion in Germany makes it quite unlikely that the German authorities will eagerly pursue this course of action. But if the situation in Germany is indeed such that the Germans will not bring to trial men such as those who were deeply implicated in the extermination of European Jewry, the sooner that fact is apparent and generally understood the better it will be for all concerned.

Review and Clemency

Under the provisions of Military Government Ordinance No. 7, the judgments of the Nuernberg Military Tribunals are final and not subject to review (Art. XV). The sentences imposed by the tribunals, however, are subject to review by the Military Governor, who is empowered "to mitigate, reduce, or otherwise alter" the sentences, but not to "increase the severity thereof" (Art. XVII). The sentences

[228] A good example is General Hans Felber, Military Commander in Serbia during 1943 and 1944, who would certainly have been named as a defendant in the "Hostage case" (Case No. 7).

[229] SS Brig. Gen. Otto Rasch, indicted in the "Einsatz case" (Case No. 9), but not tried, has since died.

[229a] [Gustav Krupp died 16 January 1950.]

in all cases but one (the "Ministries case," Case No. 11) were in fact reviewed by General Clay prior to his resignation as Military Governor. All sentences imposed by the Nuernberg tribunals were confirmed by General Clay, except the sentence of death imposed on Karl Sommer (in the "Pohl case," Case No. 4), which was reduced by him to life imprisonment. The sentences pronounced in the "Ministries case" are still pending before the new Military Governor and High Commissioner, the Honorable John J. McCloy. Likewise, as of the date of this report certain petitions filed by the defendants in that case for modification of the judgment had not yet been acted upon by the tribunal (Military Tribunal IV).

After the first of the Nuernberg judgments under Law No. 10 (in the "Milch case," Case No. 2), the defendant in that case, by his attorney (Dr. Friedrich Bergold), requested the Military Governor to forward to the Supreme Court of the United States certain papers in the nature of a petition for a writ of habeas corpus. Without argument and by an evenly divided vote (4 to 4), the Supreme Court denied the petition for lack of jurisdiction. Similar petitions were filed following the judgment in the "Medical case" (Case No. 1), in which seven capital sentences had been imposed by the Tribunal and confirmed by the Military Governor. These petitions were likewise turned down, but by a 5 to 3 vote (Justice Douglas' vote accounting for the shift). Thereafter (2 June 1948) the seven condemned men were executed by hanging at Landsberg Prison. Similar petitions were filed with the Supreme Court following confirmation of the sentences in most of the other Law No. 10 trials (the "Justice," "Pohl," "Hostage," "RuSHA," "Einsatz," and "High Command" cases, No. 3, 4, 7, 8, 9, and 12, respectively), all of which were denied on 2 May 1949 by an evenly divided vote (4–4). In its order denying these petitions, the court stated—

> Treating the application in each of these cases as a motion for leave to file a petition for an original writ of habeas corpus, leave to file is denied. The Chief Justice, Mr. Justice Reed, Mr. Justice Frankfurter, and Mr. Justice Burton are of the opinion that there is want of jurisdiction. U. S. Constitution, Article III, Section 2, Clause 2; see *Ex parte Betz* and companion cases, all 329 U. S. 672 (1946); *Mileh* v. *United States*, 332 U. S. 789 (1947); *Brandt* v. *United States*, 333 U. S. 836 (1948); *In re Eichel*, 333 U. S. 865 (1948); *Everett* v. *Truman*, 334 U. S. 824 (1948). Mr. Justice Black, Mr. Justice Douglas, Mr. Justice Murphy, and Mr. Justice Rutledge are of the opinion that argument should be heard on the motions for leave to file the petitions in order to settle what remedy, if any, the petitioners have. Mr. Justice Jackson took no part in the consideration or decision of these applications.

It will be noted that the defendants in the three industrialist trials (the "Flick," "Farben," and "Krupp," Cases No. 5, 6, and 10) have not filed petitions in the Supreme Court. By an American attorney, however, Flick has filed a petition for writ of habeas corpus in the

United States District Court for the District of Columbia. The District Court denied the petition, and on appeal to the Court of Appeals for the District of Columbia the decision below was affirmed, on the ground "that the tribunal which tried and sentenced Flick was not a tribunal of the United States," but that on the contrary "its existence and jurisdiction" were "rooted in the sovereignty of the Four Powers, exercised jointly through the supreme governing authority of the Control Council."[230] It may be expected that Flick's attorneys will seek to bring this case up before the Supreme Court by a writ of *certiorari*.[231]

Landsberg Prison

As described above,[232] there were 100 individuals convicted at Nuernberg who were sentenced to prison terms of 5 years or more. These men (as well as the 16 condemned men awaiting execution) are all confined in the prison at Landsberg-am-Lech in Bavaria, where Adolf Hitler was imprisoned after the abortive Nazi putsch at Munich in 1923. In addition to the Nuernberg convicts, there are over 600 prison inmates who were convicted of war crimes in other trials, for the most part at Dachau. Landsberg prison is under American military administration; the prison commandant is an army officer who reports to the Post commander of the Augsburg Military Post.

From time to time, articles have appeared in the German press criticizing the administration of Landsberg jail and accusing the American authorized of tolerating inhumane conditions. For example, on 1 February 1949 the *Hamburger Freie Presse* carried an article purporting to be written by a Prof. Hans von Hentig, of Kansas City, charging that "leading directors of the Farben trust" were "crammed together with criminals" (sic) and were being mistreated in various ways. More recently the German Catholic Bishop of Munich (Hans Meiser) told the press that he had written a letter to General Clay charging that the prison commandant had been guilty of brutality and various other abuses.[233] A handbill soliciting food parcels for the inmates of Landsberg "to alleviate their sufferings" (attached hereto as Appendix S) has been widely circulated in Germany.

On 14 February, pursuant to the instructions of the Secretary of the Army (then the Honorable Kenneth C. Royall), I visited and made an unofficial inspection of Landsberg prison, and subsequently (16 March 1949) submitted a report thereon to the Secretary of the Army and General Clay. In that report I expressed "my belief that the prison

[230] This decision was rendered on 11 May 1949, and the opinion is by Judge Proctor.

[231] [On 14 November 1949 the United States Supreme Court denied Friederich Flick's petition for writ of certiorari. Mr. Justice Black was of the opinion certiorari should have been granted. Mr. Justice Jackson and Mr. Justice Douglas took no part in the consideration or decision of the application (Misc. No. 317).]

[232] *Supra*, pp. 91–92.

[233] See the *New York Herald Tribune*, Paris edition, United Press dispatch, 3 May 1949.

is fairly and efficiently administered and that (given the general circumstances which prevail throughout Germany at the present time) conditions at Landsberg are generally satisfactory." However, the report also contained the following observations and recommendation:

> Conditions at any prison may deteriorate very rapidly, due to a change in administration or for many other reasons. In view of the auspices under which the inmates of Landsberg were convicted, it might be a serious setback to the political and moral prestige of the United States government if, in the future, it should appear that conditions at Landsberg were inhumane or otherwise substandard. For this reason, I recommend that the Military Governor (or his successor) should establish a standing committee to supervise and periodically inspect Landsberg prison. The Theater Judge Advocate, the Director of the Legal Division (OMGUS), and the Theater Provost Marshal should be represented on the committee.

In my memorandum submitting the report on Landsberg prison to General Clay, I also pointed out that:

> The present inmates of Landsberg Prison include 245 convicted war criminals who are serving life sentences, and 201 who are serving sentences of more than 10 years. It is, therefore, desirable that consideration be given to the eventual disposition of these prisoners, in case changed conditions should make their removal from Germany necessary or desirable, or in case our occupation forces should be withdrawn from Germany, prior to the expiration of these sentences.

I would like here to reiterate the recommendations quoted above. In the light of the increasing amount of "ultra-nationalist" sentiment expressed in the German press, attacks on the administration of Landsberg are likely to continue. It is important that no foundation or excuse be provided to those who would be only too eager to capitalize on our mistakes. In this connection, I further recommend that the administration of Landsberg be kept in American hands, and under no circumstances be turned over to the Germans. If Landsberg were put under German management, the officials charged with that responsibility would surely find themselves in a most unenviable position, and subject to constant pressure from sources within Germany. Under present circumstances, it would be unfair to the German officials to impose this responsibility on them, while at the same time, in my judgment, very definite security risks would result from any such arrangement.

Document Disposal

One of the most important problems connected with the deactivation of the military tribunals and OCCWC was the disposition of the very large amount of documents comprising the records of the Nuernberg cases and other collections and files which had been assembled in connection with the trials. This task was carried out with great care and efficiency by Mr. Fred Niebergall, Chief of the Documentation Branch.

The original records of the twelve Nuernberg trials under Law No. 10 are to be deposited in the National Archives in Washington. These comprise the certified transcripts of proceedings in English and German, the documents received in evidence, all indictments, motions, and other formal papers, etc. The records of the first four trials ("Medical," "Milch," "Justice," and "Pohl") have already been placed in the Archives, and the remainder will be in due course. These original records, of course, have come from the custody of the Secretary General of the Military Tribunals (Dr. Russell), and not from Mr. Niebergall.

There are approximately 10 other fairly complete[234] sets of the complete court records. Three of these have been placed in the Library of Congress, and one in the Library of the Harvard Law School at Cambridge, Mass., for use in connection with an international law research project of major proportions which is under consideration there. A fourth set is in the Nuernberg State Archives at Nuernberg, Germany. Five nations maintained permanent delegations at Nuernberg throughout the trials under Law No. 10, and these delegations each received a complete set of the trial records. Accordingly, it may be assumed that such sets exist and are available in England, France, Holland, Czechoslovakia, and Poland.

The foregoing comprise all the complete sets of Nuernberg trial records that have, or are believed to have, been preserved intact. In addition, however, a number of "sets" of important portions of the Nuernberg papers were assembled. These "sets" consist of the transcript of proceedings in all 12 cases (in English or German, depending upon the destination of the particular set), and copies in both German and English of all documents in the OCCWC document room, together with a brief summary (called a Staff Evidence Analysis) of each document. These sets, therefore, contain not only all documents offered by the prosecution, but a number of documents which were collected but were never offered in evidence. The sets do not, however, contain the documents collected and offered by the defense, nor do they contain motions, briefs, and other such court records. One each of these sets (the transcript of the proceedings being in English) has been sent to the following libraries in the United States: University of California, University of Chicago, Columbia Law School, Duke University, Harvard Law School, the Hoover Institute (Stanford University), New York Public Library, University of North Dakota, Northwestern University, Princeton, University of Michigan, University of Washington Law School, West Point, and the University of Wisconsin. Such sets have also been sent to the

[234] They lack various motions, orders, and other interlocutory papers.

Wiener Library in London and the United Nations at Lake Success. Additional sets (the transcript of the proceedings being in German) were sent to the Universities of Erlangen, Freibourg, Frankfurt, Goettingen, and Heidelberg, as well as to the State Chancellery at Munich.

In addition to the foregoing, many particular sets of documents or portions of the records have been distributed. The proceedings in the "Medical case," for example, have been furnished to the New York Academy of Medicine. The large collection of photographs in the possession of the son of Hitler's former personal photographer (Heinrich Hoffmann) has been turned over to the Historical Division of EUCOM.

One original document of prime historic value which is receiving "special treatment" is the diary of Gen. Franz Halder, Chief of the General Staff of the German Army from November 1938 to September 1942. The available portion of Halder's diary begins in early August 1939, and thus covers the whole course of the war up to the beginnings of the Stalingrad disaster when Halder himself was relieved. The original diary is written in Gabelsberger shorthand, at which Halder was proficient, and as a result the diary is extremely full and detailed. The staff of OCCWC has transcribed the entire diary into German and translated it into English, with the assistance of General Halder himself, in order to make sure that both German and English versions are accurate. The original diary I have put on temporary deposit in the Library of Congress, pending final decision as to its disposition. Mimeographed copies of the Halder diary (as well as the almost equally important diary of General Jodl) are available at the Department of the Army. In view of their great historic importance, it is my recommendation that both of these diaries should be made generally available to scholars and writers and should, if possible, be published in full.

Publications

The 12 cases tried under Control Council Law No. 10 required over 1,200 days of court proceedings, and the transcript of these proceedings exceeds 330,000 pages, exclusive of hundreds of documents, briefs, and other records. Publication of all of this material, accordingly, was quite unfeasible. However, in my preliminary report to the Secretary of the Army (Mr. Royall) of 12 May 1948, I recommended that the important portions of the Nuernberg proceedings be published in both German and English.[235] I pointed out therein that "the United States Government has made a heavy moral investment in these trials, and this investment will not show a favorable rate of return if the records are left in the dust on the top shelf out of reach." In support of my

[235] The report of 12 May 1948 is attached hereto as Appendix A.

recommendation, I further listed three reasons as of leading importance:

To safeguard the reputation of the judicial process as carried out at Nurnberg. As Mr. Justice Jackson stated in opening the trials before the International Military Tribunal, "We must never forget that the record on which we judge these defendants today is the record on which history will judge us tomorrow." The Nurnberg record is a good one. We must not provide an excuse for ill-informed discussion of the Nurnberg trials by making access to the truth difficult. From the standpoint of fairness to the defendants, the Nurnberg record is one of which no American citizen, and particularly no American judge or lawyer, need be anything but proud. It is important that this fact be known as widely as possible, both at home and abroad, and the best way to accomplish this is to lay the record of the proceedings before the lay public and the professional bar.

To aid in the development of a workable and enlightened system of international law. During the past century, the focus of activity in international law has moved rapidly from the academic lecture hall toward the courtroom and diplomatic conference chamber. The Nurnberg proceedings are among the outstanding examples of modern international law in action. Many perplexing problems of international legal procedure have been met and answered in the course of these trials, and many profoundly important substantive questions have received the considered judgment of experienced jurists. International penal law—like the Anglo-Saxon common law, from which our most cherished legal institutions derive—is growing by the case method. The trials of major war criminals at Nurnberg, Tokyo, Rastatt (where the French are holding a most important trial under Control Council Law No. 10), and elsewhere, will be looked to by diplomats and international jurists just as the decisions of our own courts are looked to by our statesmen and lawyers.

To promote the interest of historical truth and to aid in the reestablishment of democracy in Germany. As you recently stated in a speech at Denver, "The first purpose of occupation was to prevent Germany from ever again upsetting the peace of the world * * * we were determined to create conditions in Germany which would put a stop to her militarism once and for all. No matter how many other issues have woven themselves into the German picture, we must not forget this original purpose of occupation. To this purpose we must still adhere—for the sake of our peace and the peace of our world." The re-education of Germany in order to provide a sound basis for a democratic government is a crucial objective, but it is far from easy to take effective steps in pursuance of this purpose. But one thing we can do is to make the facts available to German historians, so that future generations of Germans will be able to grasp the full and malignant import of the Third Reich, and understand why it proved such a terrible engine of destruction for the world and for Germany herself.

I have laid the principal stress on Germany in this connection, but I do not overlook that history is no respecter of nationalities and has lessons for us all. Never before has such a wealth of tested historical material been put at the disposal of scholars as at Nurnberg. The reports and other documents of the German Foreign Office, the Wehrmacht, and other governmental and private institutions have been made part of a public record and have been subjected to all the explanations and qualifications that the very men who wrote these documents chose to advance. This is the raw material of history in wonderful profusion.

Of course, the reasons sketched above are in large part the same reasons which required holding the trials. The whole project will be left truncated and

incomplete unless adequate publication is ensured in both the English and German languages.

In acknowledging receipt of my report, Mr. Royall stated that he had "instructed careful study to be made as to the practicability of promptly publishing the proceedings as recommended by you."

Upon inquiry directed to the Departments of State and Justice, both of those departments expressed themselves (in July 1948) as in favor of publishing the trial records as recommended by me, and on 19 August 1948 the Acting Chief of the Civil Affairs Division submitted to the Secretary of the Army a formal recommendation to this effect, together with an estimate of the cost of 1,000 sets of a series of 15 volumes. The proposal and estimate were approved by Mr. Royall.

Since that time, preparation of the records for publication has been in process both at Nuernberg and in the War Crimes Division of the Office of the Judge Advocate General in the Pentagon Building. Because of the unexpected delay in the rendition of the last two Nuernberg judgments, and because the difficulties of preparing an accurate text (much of which is based on translation from German) have been greater than anticipated, progress has been slowed. Volume I, however, is now in page proof and will be printed and published shortly, and Volume II will be in page proof in the very near future. Volumes IV and V are edited and checked and available for printing, and several other volumes can be made ready for printing within the next 6 or 8 weeks.[236]

In a memorandum to the Secretary of the Army (Mr. Gordon Gray) dated 7 July 1949, I have reiterated and reaffirmed the recommendation made the previous year to Secretary Royall. In my judgment, failure to complete the publication of the Nuernberg trial records in both English and German would tend strongly to defeat the objectives of the United States in the field of war crimes as originally developed by Mr. Stimson and approved by Presidents Roosevelt and Truman, and would result in waste of most of the time, money, and effort invested over the past 10 months in the preparation of this material for publication.

[236] [Unforeseen difficulties delayed publication of the proceedings. Vol. II is now scheduled for release in February 1950 and succeeding volumes will follow periodically thereafter.]

CONCLUSION

In assaying the war crimes trials, whether at Nuernberg, Tokyo, Dachau, or elsewhere, and in studying the mistakes that were made, in order to derive therefrom lessons for the future, one must bear in mind that the profound moral and legal issues of the Second World War may or may not recur in connection with a future war, should such unhappily occur. Nor may we again be confronted with such an extraordinary situation as arose at the end of the Second World War in Europe because of the complete disintegration of the entire governmental structure of Germany.

For it was these circumstances that led to and, in large part, shaped the war crimes "program" of the United States (as well as of other countries). The boundless havoc wrought by the war, the incredible mass atrocities which accompanied its waging, and finally, the growing realization that another war might well put an end to modern civilization—these and other factors aroused a world-wide demand for the trial and punishment of those guilty of launching the war and committing the atrocities. As Mr. Justice Jackson put it in his opening statement before the International Military Tribunal,[237] these crimes and atrocities were "so calculated, so malignant, and so devastating that civilization cannot tolerate their being ignored because it cannot survive their being repeated."

Thus it came about that trials of individuals charged with the commission of "war crimes" in connection with the Second World War were held on a scale quite without precedent in recorded history. In Germany, the widespread responsibility for these crimes among the German leaders in the fields of government, arms, and industry posed problems not only of law but of judicial administration which were of truly staggering proportions. At the same time, the collapse and virtual disappearance of the German Government, the total and crushing defeat of Japan, and the intellectual and moral vacuum created in both those countries by years of tyranny followed by utter disaster, meant that the entire responsibility for stating the principles and shaping the policies in the field of war crimes was and had to be discharged by the victorious powers.

If we find ourselves again at war, and emerge victorious, the defeated enemy governments may or may not be so utterly malignant

[237] *Trial of the Major War Criminals, op. cit. supra,* Vol. II, p. 99.

as was the Third Reich. There have, needless to say, been numerous wars in modern history the conclusion of which required no "war crimes program." Neither the general public, diplomats, nor international jurists felt the need for a Nuernberg after, for example, the Crimean War, the Spanish-American War, the Russo-Japanese War of 1905, or even the Franco-Prussian War of 1870. No one can foresee the future course of events with such certainty as to rule out the possibility that such a more "limited" war—in which the moral antagonism is not so deep, the responsibility for its outbreak not so clear, and the standards of conduct on both sides are more nearly at a common level, and which is not fought "to the death"—may not occur again.

On the other hand, history sometimes repeats itself in broad outline if not in detail. The Second World War abundantly proved that dictatorship is the most constant and serious menace to world peace, as well as to the preservation of liberty and the maintenance of moral standards. Dictatorship is still playing a leading part in world affairs and international politics, and in Germany itself there is already an alarming resurgence of authoritarianism. By prudent military preparedness, by unflagging efforts to lay the groundwork for international society and the rule of law among nations, and by constant improvement in the economic and social foundations of our own democracy, we may hope at one and the same time to undermine these destructive and tyrannical forces and obviate the necessity for a victory by force of arms. It is devoutly to be hoped that there will never be a "second round" of Nuernberg trials, but this hope is most likely to be realized if the principles first judicially applied at Nuernberg are supported with all the resources at our command.

Operational Shortcomings and Their Lessons for the Future

The outstanding fact about the war crimes "problem" at the end of the Second World War is that, like many other postwar problems, it was far bigger and far more difficult of solution than anyone had anticipated. As was shown at the outset of this report,[238] the treatment of war criminals became a matter of diplomatic concern to the United States Government as early as 1942, and was under careful study by the Joint Chiefs of Staff in the late summer of 1944. Partly as a result of Mr. Stimson's deep personal interest in the question, it soon became a matter of Government policy at the highest levels, and was projected into the international arena in the spring of 1945. Following Mr. Justice Jackson's appointment as Chief of Counsel for War Crimes, all energy and attention were focused on the nego-

[238] *Supra*, pp. 1–2.

tiations which culminated in the London Agreement and Charter, and on preparations for the international trial before the IMT.

To prepare and present the case for the American prosecution, Mr. Justice Jackson assembled a large staff of attorneys and experts, including a number of experienced attorneys of outstanding ability. This staff, however, was selected and organized for the sole purpose of the first trial. Most of its members came to Nuernberg with the intention of remaining only for the few months necessary to present the prosecution's case; many of them were temporary army officers who had been away from home long periods during the war and were eager and entitled to return to their normal occupations. Mr. Justice Jackson himself was on temporary leave from the Supreme Court of the United States; this very circumstance, to say nothing of the Justice's own oft-repeated statements, made it clear that it was his high responsibility to act as the chief American prosecutor in the first international trial of war criminals, but not to assume the administrative and policy responsibilities of shaping a war crimes program for the occupational administration and establishing an organization to execute those policies.

Thus it came about that, when the Joint Chiefs of Staff finally issued their very broad directive on the subject of war crimes to General Eisenhower (J. C. S. 1023/6),[239] there was no organization available either in the United States or in Europe to carry the directive into effect. Mr. Justice Jackson's staff was fully occupied with the first trial and few of its members would be available for other proceedings. The Theater Judge Advocate was fully occupied with the limited categories of war crimes trials which fell within his jurisdiction.[240] The result of all this was that our war crimes program as a whole was delayed by almost a year in getting under way.

In retrospect, it can be seen that the loss of this year was costly. The complexion of international events changed with surprising rapidity, and German affairs rapidly—in my judgment, too rapidly—sank into relative obscurity in the press and, one must assume, in the public mind. At the same time, those who were dealing with the war crimes problems could not escape the conclusion that the root causes of the crimes were far deeper and more far-reaching than had been suspected. If the trials under Law No. 10 had started and been finished a year earlier, it might well have been possible to bring their lessons home to the public at large far more effectively.

All in all, in my opinion it would have been wise to establish at the very outset a single organization for the purpose of planning and

[239] *Supra*, pp. 4–6, J. C. S. 1023/6 is printed in full in Appendix C.
[240] *Supra*, p. 10.

carrying out the war crimes trials.[241] Had there been such an organization, the trials under Law No. 10 could have been commenced much sooner, and there need never have been such an abrupt turnover of personnel as there was between the first Nuernberg trial and those held subsequently.

The establishment of such an organization at the outset would, furthermore, have avoided certain administrative features of the Nuernberg trials which lent themselves to misunderstanding. As has been explained, it resulted from the fact that Mr. Justice Jackson and his staff arrived at Nuernberg long before the IMT was constituted or a General Secretary appointed that the prosecution was obliged to undertake the general administrative responsibility for the trials, and this situation repeated itself in October 1946 in connection with the trials under Law No. 10.[242] Many of the service functions, such as translating, interpreting, and reproduction of documents, should more logically have been performed by an over-all administrative officer such as the Secretary General than by the Chief Prosecutor. By and large, things nonetheless went reasonably smoothly, but it was impossible to avoid a certain amount of criticism of the set-up on the ground that the prosecution was in too powerful a position from an administrative standpoint. These complaints never reached serious proportions and there was, I hope and believe, little basis for them in any event, but if everything were to be "done over again," I would certainly recommend that the locus of administrative responsibility not be placed in the prosecution.

Apart from the shortcomings in the initial planning and basic administrative organization, it seems to me that there has been an unfortunate lack of planned effort to utilize the documents and other evidence disclosed at the trials so as to advance the purposes of the occupation of Germany. Nowhere can these records be put to more immediate or better use than in German schools and universities, and in German books and magazines. It is true, to be sure, that the reorientation of German thought along democratic lines must ultimately be accomplished by the Germans themselves. But the least we can do is to insure that the documents which expose the true nature of the Third Reich are circulated throughout Germany. The Nuernberg documents must be utilized to the full in writing German history, if the Germans of today are to grasp the truth about the past. In my opinion, it should be a primary objective of the Education and Information Control branches of the occupational administration to effect this distribution.

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[241] In point of fact the division of business between Nuernberg and Dachau never presented any really troublesome jurisdictional or administrative problems, but there was no logical basis for this dichotomy, which arose almost by chance because of the sequence of events.

[242] *Supra*, p. 38.

The first Nuernberg trial before the IMT and the 12 succeeding Nuernberg trials were held under distinct juridical auspices, in that the IMT derived its jurisdiction from the London Agreement and Charter, while the later Nuernberg tribunals were established pursuant to Control Council Law No. 10. As has been seen, however, the provisions of the London Charter and Control Council Law No. 10 closely parallel each other, and the underlying principles are identical. The first trial and the 12 following trials, therefore, form a single sequence based on common principles.

What did the judgments in and results of the trials under Law No. 10 add to what had been accomplished by the IMT? Apart from the particular matters suggested below, it seems to me that the most important feature of the trials under Law No. 10 was that they showed that Nuernberg was a process, not an episode. Despite the stature of the IMT judgment, had it stood as the sole judicial utterance at Nuernberg it would have been subject to the unwarranted criticism that it was merely the product of the political forces of the moment. In fact, however, Nuernberg was based on enduring principles and not on temporary political expedients, and this fundamental point is apparent from the reaffirmation of the Nuernberg principles in Control Council Law No. 10, and their application and refinement in the 12 judgments rendered under that law during the 3-year period, 1947 to 1949. During those years the international political situation underwent revolutionary changes, but the principles of Nuernberg continued to be applied there.

So far as the basic principles of international penal law are concerned, the IMT and the Law No. 10 tribunals worked within the same framework. The definitions of international crimes contained in the London Charter and Law No. 10 were the same in outline and in most of the details. So far as the interpretation of these definitions was concerned, the IMT and the later tribunals alike gave full weight to the general principle that criminal statutes are, in case of ambiguity, to be strictly construed. For the most part, the tribunals established under Law No. 10 were reluctant under any circumstances to adopt a broader construction of these definitions than the IMT had applied in its judgment.

Nonetheless, several developments under Law No. 10 are of major importance. Perhaps of outstanding interest was the decision in the "Ministries case" (Case No. 11) that the German conquests of Austria and Czechoslovakia constituted crimes against peace, even though both those countries succumbed to German threats without offering military resistance so that no "shooting war" occurred.[243] Inasmuch

[243] From this conclusion, one of the three judges in that case (Judge Powers) dissented.

as the indictment filed before the IMT did not charge that the invasions of these two countries constituted independent "crimes against peace," but only that they constituted part of the conspiracy or common plan to commit the crimes charged elsewhere in the indictment, this question was not involved in the first Nuernberg trial. That the IMT would have come to the same conclusion had it been confronted with this problem under Law No. 10 is probable, inasmuch as the IMT declared in its judgment that the invasions of Austria and Czechoslovakia were "aggressive acts." [244] In line with these statements by the IMT, the square decision of Tribunal No. IV to this effect seems to me unassailable. Otherwise, it would follow that a great power may, with legal impunity, mass such large forces to threaten a weaker country that the latter succumbs without offering resistance. If it is a crime to initiate aggressive war by deliberately attacking another country by military force, surely it is no less a crime to conquer it by military threats. In view of the manner in which a dictatorial regime has been imposed on several European nations since the end of the Second World War, the decision in the "Ministries case" is of particular current significance.

With respect to "war crimes" and "crimes against humanity," likewise, some notable decisions were rendered by the Law No. 10 tribunals. The laws and usages of war, both those relating to combat and those governing military occupation, were reaffirmed and refined in all 12 of the cases. The decisions in the "Hostage case" (Case No. 7) with respect to the belligerent status of guerrillas and partisans, and the treatment of hostages, have attracted widespread comment—some critical and some complimentary—and will no doubt stimulate efforts to review the provisions of the Hague and Geneva Conventions relating to these controversial questions. The major question of whether atrocities committed in peacetime by a government against its own citizens in the course of religious, racial, or political persecutions are offenses against international penal law was considered far more searchingly by several of the Law No. 10 tribunals than by the IMT. No definitive precedent was established; in the two cases in which the indictment presented this question the tribunals ruled that the language of Control Council Law No. 10 did not comprehend the crimes charged.[245] In two other cases, however, where the question was collaterally involved, the tribunals made significant observations on this subject. Thus, in the "Einsatz case" (Case No. 9) Tribunal No. II stated: [246]

> Crimes against humanity are acts committed in the course of wholesale and systematic violations of life and liberty. It is to be observed that insofar as

[244] *Trial of the Major War Criminals, op. cit. supra,* Vol. I, pp. 318, 334.
[245] The "Flick case" (Case No. 5) and the "Ministries case" (Case No. 11).
[246] Transcript of proceedings, p. 6767.

international jurisdiction is concerned the concept of crimes against humanity does not apply to offenses for which the criminal code of any well-ordered State makes adequate provision. They can only come within the purview of this basic code of humanity because the State involved, owing to indifference, impotency, or complicity, has been unable or has refused to halt the crimes and punish the criminals.

And in the "Justice case" (Case No. 3) the court said: [247]

> * * * it can no longer be said that violations of the laws and customs of war are the only offenses recognized by common international law. The force of circumstance, the grim fact of worldwide interdependence, and the moral pressure of public opinion have resulted in international recognition that certain crimes against humanity committed by Nazi authority against German nationals constituted violations not alone of statute but also of common international law.

Important as the foregoing decisions and observations may be in the development of international penal law, the major legal significance of the Law No. 10 judgments lies, in my opinion, in those portions of the judgments dealing with the *area of personal responsibility* for international law crimes. The trials under Law No. 10 covered a very much wider variety of circumstances than the IMT case. Most of the defendants in the first trial were the surviving topmost Nazis (Goering, Hess, and Ribbentrop) and prominent Nazi administrators and officials (such as Sauckel, Frick, Funk, Speer, and others). Very few of these Nazi leaders would have normally been described as "respectable people" in a government or community of moderately high personal standards. Other IMT defendants such as von Neurath and Schacht were, to be sure, in a rather different category, but they were few in number. The trials under Law No. 10, on the other hand, explored the record and judged the conduct of a large number of men who were not "professional Nazis" but who occupied key positions in the Third Reich, such as career diplomats, doctors, lawyers and judges, businessmen, and military leaders. Whatever mistakes were made at Nuernberg, and no doubt there were many, I do not think it can ever be seriously charged that wealth, prestige, or the "garments of respectability" served to protect from indictment any individual against whom substantial evidence appeared to exist, or that any group or category was singled out for either favorable or severe treatment.

In judging the defendants from all these walks of life, the tribunals were called upon to weigh—whether by way of defense or mitigation—all the attendant facts, circumstances, pressures, and fears which influenced or were alleged to have influenced the conduct of these men. All of the indicted industrialists, for example, sought to justify their utilization of slave labor on the ground that they lived in fear of Nazi tyranny and were obliged to comply with governmental policy. The iron and steel magnate, Friedrich Flick, coined the phrase "howling

[247] Transcript of proceedings, p. 10641.

with the wolves" to explain his anti-semitic utterances and participation in "Aryanization" of Jewish property. Flick and others described their close associations with Himmler as "an insurance premium to insure personal safety." The indicted military leaders sought refuge in the analogous plea of "superior orders." In all these cases the tribunals had to determine whether the plea of "duress" or "superior orders" was genuine—i. e., whether the defendant had in fact acted under the pressure of fear or willingly—and, if the plea was found to be *bona fide*, to what extent it should be given weight in defense or mitigation. The observations of Tribunal III in its judgment in the "Krupp case" (Case No. 10) seem to me the most penetrating that were made on this score:[248]

> * * * the question from the standpoint of the individual defendants resolves itself into this proposition: To avoid losing my job or the control of my property, I am warranted in employing thousands of civilian deportees, prisoners of war, and concentration camp inmates, keeping them in a state of involuntary servitude; exposing them daily to death or great bodily harm, under conditions which did in fact result in the deaths of many of them; and working them in an undernourished condition in the production of armament intended for use against the people who would liberate them and indeed even against the people of their homelands.
>
> If we may assume that as a result of opposition to Reich policies, Krupp would have lost control of his plant and the officials their positions, it is difficult to conclude that the law of necessity justified a choice favorable to themselves and against the unfortunate victims who had no choice at all in the matter. Or, in the language of the rule, that the remedy was not disproportioned to the evil. In this connection it should be pointed out that there is a very respectable authority for the view that the fear of the loss of property will not make the defense of duress available.
>
> But the extreme possibility hinted at was that Gustav Krupp and his officials would not only have lost control of the plant but would have been put in a concentration camp had they refused to adopt the illegal measures necessary to meet the production quotas.
>
> * * * * * * *
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> * * * in all fairness it must be said that in any view of the evidence the defendants, in a concentration camp, would not have been in a worse plight than the thousands of helpless victims whom they daily exposed to danger of death and great bodily harm from starvation and the relentless air raids upon the armament plants to say nothing of involuntary servitude and the other indignities which they suffered. The disparity in the number of the actual and potential victims is also thought provoking.

The Nuernberg trials are not, of course, of interest to lawyers alone. The documentation is amazingly profuse and enlightening, and no well-rounded study of German or European affairs since the First World War can now be made without taking full account of the documents (as well as the testimony) offered in the trials of the diplomats, industrialists, and military leaders. Even more important, the records of these trials embody a most penetrating examination and minute dis-

[248] Transcript of proceedings, pp. 13396–13397.

section of the nature and functioning of dictatorship in the modern world. For obvious reasons, the study of dictatorship today is no academic essay, and the analysis of its strengths and weaknesses is vital to military and political planning for peace or war alike. As I have stated on numerous other occasions, I am convinced that the record of dictatorship in the Third Reich leads inevitably to the conclusion that, as compared with democracy, dictatorship is a highly inefficient form of government.[249]

The Nuernberg trials under Law No. 10 were a part of the Allied occupation of Germany, and thus an important feature of our occupation policy. I have already emphasized what seems to me the vital importance of publishing the more important portions of the Nuernberg documents and judgments in German and effectuating their widespread circulation in Germany.[250] In this connection, it is noteworthy that some Germans have covertly urged that the Nuernberg proceedings should not be published in German because the trials are said to be a "sore spot" in relations between the United States and the German people. These Germans suggest, in short, that Nuernberg should be "played down" in Germany, and allowed to sink into oblivion.

I have noted this point of view, if such it may be called, not because it has any intrinsic substance or merit, but rather because its thoroughly meretricious character serves only to underline one salient fact about the Nuernberg trials, which we will do well not to forget. Nowhere—and particularly not within Germany—can the Nuernberg trials be "played down," and regardless of whether the ultimate judgment of history with respect to Nuernberg is favorable or unfavorable, they will not "sink into oblivion." The personalities and issues with which the trials dealt have been far too important in German history and German thought to be forgotten or passed over. On the contrary, they are bound to be increasingly a focal point of discussion and controversy within Germany. Constantly they are discussed, often bitterly attacked, and less often defended, in the German press and periodical literature. As economic and cultural conditions in Germany return to normal, it is certain that Nuernberg will receive an ever-increasing share of attention from German politicians, jurists, and others.

A failure to disseminate the Nuernberg records and judgments in Germany, accordingly, is not only a failure to make use of their contents to promote the positive aims of the occupation. It is a failure to put the necessary "ammunition" in the hands of those Germans who can make use of the documents presented and testimony given during the trials in reconstituting a democratic German society. Mr. John J. McCloy, in his first major speech since taking office as High

[249] See, for example, *The Nuernberg War Crimes Trials: An Appraisal,* published in the proceedings of the Academy of Political Science for May 1949.

[250] *Supra,* pp. 100–102.

Commissioner and Military Governor for Germany, has declared that a very hopeful sign is to be seen in the existence of "a strong core of freedom-seeking people among the general population" [251] of Germany, to be found among liberals, labor groups, and the middle classes. If this hope is to be realized, we must give all possible support to these democratic German groups. In my opinion, any effort to "soft pedal" Nuernberg will inevitably play into the hands of those Germans who do not want a democratic Germany.

The documents and testimony of the Nuernberg record can be of the greatest value in showing the Germans the truth about the recent past, quite apart from the judgments and sentences pronounced on individual defendants. The judgments, and the principles of law on which they were based, must obviously be considered in a world setting, and not in a purely German context. There is little chance that the judgments and principles of Nuernberg will be of much benefit in Germany if they fail to win more than lip-service in the world at large. The fact that the judges who composed the Nuernberg tribunals were citizens of one of the victorious powers has been much commented upon. In fact, there was no practicable alternative, and I do not regard this as a serious defect in the Nuernberg process from the standpoint either of theoretical jurisprudence or of intrinsic fairness. It is, however, a circumstance which the Germans are not likely to overlook. Unless the United States and the other governments who participated in the Nuernberg process seriously endeavor to establish a permanent international penal jurisdiction, and to take such other steps as are feasible to enforce the Nuernberg principles, whether by prevention or punishment, it will be inevitable that the Germans will conclude that Nuernberg was "for Germans only."

And this brings me, in conclusion, to what I regard as the major contribution which the Nuernberg trials have made to the preservation of peace and the establishment of world order under the rule of law. The framing of the underlying principles of international penal law in the London Agreement and Control Council Law No. 10, and the interpretation and application of these principles by means of the Nuernberg judicial process, have in a very few years, added enormously to the body and the living reality of international penal law. No principle deserves to be called such unless men are willing to stake their consciences on its enforcement. That is the way law comes into being, and that is what was done at Nuernberg.

[251] See *The New York Times*, p. 12, 10 August 1949.

APPENDICES

Appendix A

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FOR RELEASE IN A. M. PAPERS, MONDAY, MAY 17, 1948

GENERAL TAYLOR'S REPORT

RELEASED BY ARMY

Secretary of the Army Kenneth C. Royall today made public a report on the conduct and current status of the Nuernberg war crimes trials by Brigadier General Telford Taylor, Chief of Counsel for War Crimes.

In a letter of acceptance to General Taylor, Secretary Royall wrote:

"I have received and carefully studied your excellent report on the conduct and current status of the war crimes trials before the Nuernberg Military Tribunals.

"I commend you not only for the thoroughness and clarity of the report but also for your competent prosecution of the trials and for the progress which you have made up to this date.

"I have no changes to suggest in the future plans disclosed in your report.

"I have instructed careful study to be made as to the practicability of promptly publishing the proceedings as recommended by you."

The text of General Taylor's report follows:

May 12, 1948

Secretary of the Army,
Washington 25, D. C.

MY DEAR MR. SECRETARY:

The closing of the evidence in the I. G. Farben case is a fitting occasion for the submission, at your request, of this statement on the progress of the Nuernberg War Crimes Trials. It may be expected that the Nuernberg Tribunals will render judgments, in the Farben case and the other three cases which are still pending, during the coming summer. Upon the delivery of these four judgments, a full and final report will be submitted.

The Nuernberg Military Tribunals: Control Council Law No. 10

As you will recall, the first Nuernberg trial before the International Military Tribunal was conducted under the authority of the London Agreement and

Charter of August 8, 1945, signed by the representatives of the United States, United Kingdom, France and the Soviet Union, and adhered to by 19 other governments. The subsequent Nuernberg trials of major war criminals have been conducted under the authority of Control Council Law No. 10, a quadripartite enactment of the Control Council, the purpose of which is to give effect to the Moscow declaration of 1943 and the London Agreement of 1945, and to "establish a uniform legal basis in Germany for the prosecution of war criminals and other similar offenders." The jurisdiction of the Nuernberg Military Tribunals is limited and controlled by Law No. 10, which recognizes certain categories of international crime in substantially the same language as was used in the London Agreement and Charter. Law No. 10 further authorizes each of the four occupying authorities in Germany to establish tribunals, for the trial of offenses against international penal law as declared by Law No. 10. Pursuant to this authority, the Military Governor for the American Zone of Occupation in Germany promulgated Ordinance No. 7 in October 1946, which establishes the tribunals authorized by Law No. 10, and in part governs the procedure for the trial of cases before them.

Since October 1946, a number of such tribunals have been constituted in Nuernberg. The establishment of these tribunals and the holding of these trials has been, as appears above, not only an integral part of our occupation policy, but also a fulfilment of international commitments and obligations entered into by the United States Government at Moscow, London, and Berlin. They have been held in the American Zone of Occupation before courts composed of American judges, but the constitution of these tribunals and their jurisdiction to punish offenses under international penal law is governed by an international quadripartite enactment which is, itself, part of an international policy in which our country has participated for nearly five years.

The Twelve Nuernberg Trials Under Control Council Law No. 10

Under Article III of Ordinance No. 7, the Chief of Council for War Crimes is authorized to determine the persons to be tried before the Nuernberg Military Tribunals and to prepare and file the indictments, setting forth the particular charges against the indicted defendants. Accordingly, one of the first and most important responsibilities of my office was to determine, in the light of the best available information, where the deepest individual responsibilty lay for the manifold international crimes committed under the aegis of the Third Reich. It should be emphasized that the Nuernberg trials have been carried out for the punishment of crime, not for the punishment of political or other beliefs, however mistaken or vicious. Consequently, in the selection of defendants, the question whether a given individual was or was not a "Nazi" in a political or party sense has not been governing. No one has been indicted before the Nuernberg Military Tribunals unless, in my judgment, there appeared to be substantial evidence of criminal conduct under accepted principles of international penal law.

Nor would it have been fair or wise to favor or discriminate against any particular occupation, profession or other category of persons. To preserve the integrity of the proceedings, it was necessary to scrutinize the conduct of leaders in all occupations, and let the chips fall where they might. As might be expected, it developed that there were individuals prominent in nearly all walks of life who participated in the criminal ventures of the Third Reich.

In pursuance of the principles set forth above, 12 indictments in all were prepared and filed before the Nuernberg Military Tribunals. All 12 cases have been brought to trial. Eight of them (involving 114 defendants) have been completed, and the remaining four (involving 70 defendants) are rapidly nearing

their conclusion. The 12 cases are listed, together with a brief description of each, in the appendix to this statement.

The eight cases which have been completed include three in which the defendants were leading officials in Himmler's notorious SS, which was declared a criminal organization by the International Military Tribunal; one case in which the defendants were field marshals and generals of the German Army charged with atrocities committed during the German occupation of Norway and the Balkan countries, particularly Greece and Yugoslavia; two cases in which the defendants were leaders in the German medical and legal professions respectively; the case against the well-known industrialist Friedrich Flick and five of his associates; and the case against Field Marshal Erhard Milch. Judgments in these eight cases were rendered by the various Nuernberg Military Tribunals between August 1947 and April 1948. The sentences imposed are tabulated in the appendix.

In my opinion, the records and judgments in these eight trials constitute a landmark in the development of international law, as well as a vital source of information upon the basis of which history can be written far more truthfully and fully than would otherwise have been possible. Their great importance will become more manifest as time goes on. I am confident that the verdict in future years will be that the judges who rendered these decisions were entirely free of any vengeful or repressive motives, and that the judgments reflect their deep concern for the rights of the defendants and the requirements of a fair trial. The basic integrity of these proceedings is manifest in every sentence of the judgments. From a juridical standpoint, their workmanship is honest throughout and often distinguished. As examples only, I may mention the "Medical" judgment, which embodies a classic statement of the circumstances under which human beings may be used for purposes of medical experimentation, and which will be of profound and enduring value in the field of medical jurisprudence, and the "Justice" judgment, in which the permissible standards of conduct of judges and judicial officers are set forth with the greatest care and insight.

The four cases which are still pending include the Farben and Krupp cases, the case against various military and naval officers of high rank, and the case against leading Government officials, including particularly the German Foreign Office. In all four of these cases, the prosecution was completed a month or several months ago. The taking of testimony in the Farben case has just ended and the evidence in the other three cases should be concluded during June and July. It appears probable that the four judgments will be rendered during July and August. Since these cases are still pending before the Tribunals, it appears appropriate to postpone further comment until the final report.

Publication of the Proceedings

The Nuernberg war crimes trials, accordingly, will be finished in two or three months. I have stated above that the significance of these cases will increase in future years, but this will be true only if adequate provision is made for publication of the proceedings, so that the principles applied and issues determined at Nuernberg may be known to all who are interested to read or write about them. The United States Government has made a heavy moral investment in these trials, and this investment will not show a favorable rate of return if the records are left in the dust on the top shelf out of reach.

It is not my province to speak with respect to the large trial now being concluded at Tokyo or the numerous war crimes trials—such as the "Malmedy Massacre" and "Buchenwald" trials—which have been conducted under the

authority of the Army commanders in all former theaters of war. However, it seems to me that these proceedings should not be overlooked in considering the points set forth below in connection with the Nuernberg trials.

Out of a number of reasons which, in my judgment, require the publication of the essential portions of the Nuernberg proceedings, the following three are perhaps the most important:

To safeguard the reputation of the judicial process as carried out at Nuernberg. As Mr. Justice Jackson stated in opening the trials before the International Military Tribunal, "We must never forget that the record on which we judge these defendants today is the record on which history will judge us tomorrow." The Nuernberg record is a good one. We must not provide an excuse for ill-informed discussion of the Nuernberg trials by making access to the truth difficult. From the standpoint of fairness to the defendants, the Nuernberg record is one of which no American citizen, and particularly no American judge or lawyer, need be anything but proud. It is important that this fact be known as widely as possible, both at home and abroad, and the best way to accomplish this is to lay the record of the proceedings before the lay public and the professional bar.

To aid in the development of a workable and enlightened system of international law. During the past century, the focus of activity in international law has moved rapidly from the academic lecture hall toward the courtroom and diplomatic conference chamber. The Nuernberg proceedings are among the outstanding examples of modern international law in action. Many perplexing problems of international legal procedure have been met and answered in the course of these trials, and many profoundly important substantive questions have received the considered judgment of experienced jurists. International penal law—like the Anglo Saxon common law, from which our most cherished legal institutions derive—is growing by the case method. The trials of major war criminals at Nuernberg, Tokyo, Rastatt (where the French are holding a most important trial under Control Council Law No. 10), and elsewhere, will be looked to by diplomats and international jurists just as the decisions of our own courts are looked to by our statesmen and lawyers.

To promote the interest of historical truth and to aid in the reestablishment of democracy in Germany. As you recently stated in a speech at Denver, "The first purpose of occupation was to prevent Germany from ever again upsetting the peace of the world . . . . . we were determined to create conditions in Germany which would put a stop to her militarism once and for all. No matter how many other issues have woven themselves into the German picture, we must not forget this original purpose of occupation. To this purpose we must still adhere—for the sake of our peace and the peace of our world." The re-education of Germany in order to provide a sound basis for a democratic government is a crucial objective, but it is far from easy to take effective steps in pursuance of this purpose. But one thing we can do is to make the facts available to German historians, so that future generations of Germans will be able to grasp the full and malignant import of the Third Reich, and understand why it proved such a terrible engine of destruction for the world and for Germany herself.

I have laid the principal stress on Germany in this connection, but I do not overlook that history is no respecter of nationalities and has lessons for us all. Never before has such a wealth of tested historical material been put at the disposal of scholars as at Nuernberg. The reports and other documents of the German Foreign Office, the Wehrmacht, and other governmental and private institutions have been made part of a public record and have been subjected to all the explanations and qualifications that the very men who wrote these docu-

ments chose to advance. This is the raw material of history in wonderful profusion.

Of course, the reasons sketched above are in large part the same reasons which required holding the trials. The whole project will be left truncated and incomplete unless adequate publication is ensured, in both the English and German languages. Publication in German can best be planned and carried out by the Office of Military Government (U. S.) with the advice of the OMGUS Legal and Education Divisions. Publication in English can, I suggest, be effected through the Civil Affairs Division of the Department of the Army, with the advice of other interested government agencies, such as the State and Justice Departments. Expedition is highly desirable; the project should be planned for substantial completion by the end of the calendar year 1948.

Summary

In summary I report that:

(a) The Nuernberg Military Tribunals have been established in furtherance of the purposes of Control Council Law No. 10 and other international commitments and engagements of the United States in the field of war crimes;

(b) The proceedings have been conducted with the most scrupulous regard for the rights of the defendants and in accordance with high standards of judicial procedure; and

(c) Eight of the twelve cases have been concluded by the rendition of judgments, and the remaining four cases will be concluded this summer. The eight judgments so far entered, considered as a whole, constitute a remarkable contribution to international jurisprudence.

I recommend that immediate provision be made for the expeditious publication of essential portions of the Nuernberg proceedings:

(a) The publication in English to be effected by the Civil Affairs Division of the Department of the Army;

(b) The publication in German to be effected by OMGUS; and

(c) Both publication projects to be carried out with the advice of other interested government agencies, and to be planned for completion by the end of the calendar year 1948.

Respectfully yours,

TELFORD TAYLOR,
Brig. Gen. USA
Chief of Counsel for War Crimes.

DISTRIBUTION: Aa, Af, B, Da, Dd, Dm, N.

CAD.

Case No.	Against	Indictment filed	Counts of indictment	Judges	Opening date of trial	Judgment	Nature of sentence***
1	MEDICAL Karl Brandt, et al., 23 Def. indicted, and tried.	25 Oct 46	1—Common Design or Conspiracy. 2—War Crimes. 3—Crimes against Humanity. 4—Membership in Criminal Org.	*W. B. Beals, State of Washington. H. L. Sebring, Florida. J. T. Crawford, Oklahoma. **V. C. Swearingen, Michigan.	9 Dec 46	20 Aug 47	A-7; D-7; L-5; 20Y-2; 15Y-1; 10Y-1.
2	MILCH Erhard Milch 1 Def. indicted and tried.	13 Nov 46	1—Slave Labor. 2—War Crimes. 3—Crimes against Humanity.	*R. M. Toms, Michigan. M. A. Musmanno, Pennsylvania. F. D. Phillips, North Carolina. **J. J. Speight, Alabama.	2 Jan 47	17 Apr 47	Life imprisonment.
3	JUSTICE Josef Alstoetter, et al. 16 Def. indicted, 14 tried.	4 Jan 47	1—Common Design or Conspiracy. 2—War Crimes. 3—Crimes against Humanity. 4—Membership in Criminal Org.	*J. T. Brand, Oregon. M. B. Blair, Texas. J. W. Harding, Ohio. (C. T. Marshall, Presiding, resigned because of poor health.)	5 Mar 47	4 Dec 47	A-4; L-4; 10Y-4; 7Y-1; 5Y-1; 1 suicide; 1 severed due to illness.
4	POHL & WVHA Oswald Pohl, et al. 18 Def. indicted and tried.	13 Jan 47	1—Common Design or Conspiracy. 2—War Crimes. 3—Crimes against Humanity. 4—Membership in Criminal Org.	*R. M. Toms, Michigan. M. A. Musmanno, Pennsylvania. F. D. Phillips, North Carolina. **J. J. Speight, Alabama.	8 Apr 47	3 Nov 47	A-3; D-4; L-3; 25Y-1; 20Y-1; 10Y-6.
5	FLICK Friedrich Flick, et al. 6 Def. indicted and tried.	8 Feb 47 18 Mar 47 (amended)	1—Slave Labor. 2—Spoliation in Occupied Ter. 3—Aryanization. 4—Membership in Criminal Org.	*C. B. Sears, New York. F. N. Richman, Indiana. W. C. Christianson, Minnesota. **R. D. Dixon, North Carolina.	15 Apr 47	22 Dec 47	A-3; 7Y-1; 5Y-1; 2½Y-1.
6	FARBEN Carl Krauch, et al. 24 Def indicted, 23 tried.	3 May 47	1—Crimes against Peace. 2—Plunder and Spoliation. 3—Slavery and Mass Murder. 4—Membership in SS. 5—Common Plan or Conspiracy.	*C. C. Shake, Indiana. P. M. Hebert, Louisiana. J. Morris, North Dakota. **C. F. Merrell, Indiana.	27 Aug 47	(†).	
7	HOSTAGES Wilhelm List, et al. 12 Def. indicted, 10 tried.	10 May 47	1—Mass Murder. 2—Plunder and Spoliation. 3—Illegal Executions. 4—Slave Labor.	*C. F. Wennerstrum, Iowa. E. F. Carter, Nebraska. G. J. Burke, Michigan.	15 Jul 47	19 Feb 48	A-2; L-2; 20Y-2; 15Y-1; 12Y-1; 10Y-1; 7Y-1; 1 severed due to illness; 1 suicide.
8	RuSHA Ulrich Greifelt, et al. 14 Def. indicted and tried.	1 Jul 47	1—Crimes against Humanity. 2—War Crimes. 3—Membership in Criminal Org.	*L. B. Wyatt, Georgia. D. O'Connell, Massachusetts. J. T. Crawford, Oklahoma.	20 Oct 47	10 Mar 48	A-1; L-1; 25Y-2; 20Y-1; 15Y-3; 10Y-1; 5 convicted of count 3 only but released as having already been adequately punished.

9	EINSATZGRUPPEN Otto Ohlendorf, et al. 24 Def. indicted, 22 tried.	3 Jul 47 25 Jul 47 (amended)	1—Crimes against Humanity. 2—War Crimes. 3—Membership in Criminal Org.	*M. A. Musmanno, Pennsylvania. R. D. Dixon, North Carolina. J. J. Speight, Alabama.	29 Sep 47	10 Apr 48	D-14; L-2; 20Y-3; 10Y-2; 1 convicted of count 3 only but released as having already been adequately punished; 1 suicide; 1 severed due to illness.
10	KRUPP Alfried Krupp, et al. 12 Def. indicted and tried.	16 Aug 47	1—Crimes against Peace. 2—Plunder and Spoliation. 3—Slave Labor. 4—Common Plan of Conspiracy.	*H. C. Anderson, Tennessee. E. J. Daly, Connecticut. W. J. Wilkins, State of Washington.	8 Dec 47	(†)	
11	MINISTRIES Ernst von Wiezsaecker, et al. 21 Def. indicted and tried.	15 Nov 47	1—Crimes against Peace. 2—Common Plan of Conspiracy. 3—War Crimes. 4—Crimes against Humanity—against German Nationals. 5—Crimes against Humanity—against civilian populations. 6—Plunder and Spoliation. 7—Slave Labor. 8—Membership in Criminal Org.	*W. C. Christianson, Minnesota L. C. Powers, Iowa. R. F. Maguire, Oregon.	6 Jan 48	(††)	
12	HIGH COMMAND Wilhelm von Leeb, et al. 14 Def. indicted; 13 tried (13).	28 Nov 47	1—Crimes against Peace. 2—War Crimes and Crimes against Humanity—against enemy belligerents and PW's. 3—War Crimes and Crimes against Humanity—against civilians. 4—Common Plan of Conspiracy.	*J. C. Young, Colorado. J. W. Harding, Ohio. W. B. Hale, Tennessee.	4 Feb 48	(†)	

*Presiding judge.
**Alternate judge.
***A—Acquitted; D—Death sentence; L—Life sentence; Y—Number of years.
†Completion estimated July 48.
††Completion estimated Aug 48.

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Appendix B

International Conciliation

April 1949—No. 450

NUREMBERG TRIALS

WAR CRIMES AND INTERNATIONAL LAW

Telford Taylor

CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE
405 West 117th Street, New York 27, N. Y.

PREFACE

THIS is an authoritative summary of one of the most challenging events in history, the series of trials of those charged with the major responsibility for plotting the crime of war and for inhuman practices in its conduct. At Nuremberg the conscience of western civilization came to grips not only with the brute force of militarism but also with the inadequacy of the existing law of nations as an embodiment of justice and guaranty of peace. The way in which these obstacles were made the stepping-stones to progress toward a new era is clearly set forth in the following pages. For the serious student of this question they will furnish a guide to the vast mass of evidence and arguments of the trials, a record without parallel in history. For the general reader the detailed accounts may be of less interest than the treatment of the central theme and more especially the closing sections dealing with the major issues, which will long be the subject of discussion and the basis of future practice. All of this is finally brought into focus in the Conclusion.

The author, Brigadier General Taylor, as Chief of Counsel for War Crimes, was a prosecutor in the court, but he writes here not as a prosecuting attorney but with the objectivity and judicious temper of a historian.

JAMES T. SHOTWELL
Acting President

New York, April 28, 1949.

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THE NUREMBERG WAR CRIMES TRIALS

By Telford Taylor
Brigadier General, U.S.A.
Chief of Counsel for War Crimes

INTRODUCTION

On 14 April 1949 judgment was rendered in the last of the Nuremberg war crimes trials. Far from being of concern solely to jurists, this trial and the judgment are of especial interest to diplomats and students of international affairs. Among the twenty-one defendants were six officials of the German Foreign Office, including the well-known diplomat Ernst von Weiszaecker; and the prisoners' dock also included such highly placed Reich officials as Schwerin von Krosigk (Minister of Finance from 1933 to 1945 and Foreign Minister in the "Doenitz cabinet"), Lammers (Reich Minister and Chief of the Reich Chancellery), and Darre (Minister for Food and Agriculture and Reich Peasant Leader), who in the early years of the Third Reich outshadowed even Goebbels and Rosenberg as an expositor of Nazi ideology and "geopolitics."

This trial, commonly known as the "Ministries" or "Wilhelmstrasse" case, is not only the last at Nuremberg, but also the last trial of major German war criminals under international authority. Except for the prosecution of Field Marshal von Manstein, tried by the British authorities at Hamburg, it is probably the last major World War II war crimes trial of any description.[a] It is timely, therefore, to cast a retrospective glance at the entire series of Nuremberg trials—to scan and sum up what was done there, and to consider what the meaning and value of Nuremberg may be today and in time to come.

[a] Since writing the above, Otto Abetz, former German Ambassador to the Vichy Government, was tried and convicted for war crimes in July 1949 before a tribunal sitting in Paris.

I

ORIGINS AND GENERAL NATURE OF WAR CRIMES TRIALS

Since the close of the second World War, trials of individuals charged with the commission of "war crimes" have been held on a scale quite without precedent in recorded history. The boundless havoc wrought by the war, the incredible mass atrocities which accompanied its waging, and, finally, the growing realization that another war might well put an end to modern civilization—these and other factors aroused a world-wide demand for the trial and punishment of those guilty of launching the war and committing the atrocities.

This demand did not spring up suddenly in the first flush of victory. Official protests against crimes committed by the Germans in the course of the occupations of Poland and Czechoslovakia were issued by the British, Czechoslovak, French, and Polish governments in 1940. President Franklin D. Roosevelt publicly condemned the German practice of executing scores of "innocent hostages" in October 1941, and the British Government indorsed President Roosevelt's views in a declaration by Mr. Churchill. In November 1941, and again in January 1942, the Soviet Union circulated diplomatic notes accusing the German Government of "criminal, systematic and deliberate violation of international law" by brutalities and outrages against Russian prisoners, looting and devastation, and atrocities against the civilian population.

The first step toward the formulation of a systematic program for the handling of war criminals was taken in January 1942, at a London conference of representatives of the nine European countries (Belgium, Czechoslovakia, France, Greece, Luxemburg, the Netherlands, Norway, Poland, and Yugoslavia) then occupied by Germany. This meeting culminated in the well-known "St. James Declaration" of 13 January 1942, which pointed out that—

international solidarity is necessary in order to avoid the repression of these acts of violence simply by acts of vengeance on the part of the general public, and in order to satisfy the sense of justice of the civilized world,

and in which the nine powers—

place among their principal war aims the punishment, through the channel of organised justice, of those guilty of or responsible for these crimes, whether they have ordered them, perpetrated them or participated in them, [and]

resolve to see to it in a spirit of international solidarity, that (*a*) those guilty or responsible, whatever their nationality, are sought out, handed over to justice and judged, (*b*) that the sentences pronounced are carried out.[1]

Since the war, it has often been urged by critics of Nuremberg—particularly those who deny that the trials had any valid basis in law—that the leading German war criminals should have been executed without trial as a "political measure." No such idea occurred to the representatives of the European nations that suffered most at the hands of the Nazis, at the very time that their countries lay prostrate under the German boot. The St. James Declaration called for action "through the channel of organised justice" and asked for the punishment only of those who had been "handed over to justice" and found guilty. It is clear that condemnation of the atrocities as *crimes under law*—a condemnation to be pronounced *in judicial proceedings*—was a prime objective of the St. James Declaration, quite as important as, if not more important than, the punishment of individual perpetrators of atrocities. And the view that war crimes should be handled by legal process was echoed by the United States, Britain, and the Soviet Union in their acknowledgments of the St. James Declaration. Roosevelt warned those guilty of atrocities "that the time will come when they shall have to stand in courts of law . . . and answer for their acts," Churchill declared that the accused "will

[1] *Punishment for War Crimes; The Inter-Allied Declaration Signed at St. James's Palace, London, on 13th January 1942, and relative documents* (Issued by the Inter-Allied Information Committee, London, 1942), pp. 3-4.

have to stand up before tribunals," and the Soviet reply stated that the Nazi leaders must be "arrested and tried under criminal law."

A few weeks later, in simultaneous announcements dated 7 October 1942, President Roosevelt and the British Lord Chancellor (Viscount Simon) announced the willingness of their respective governments to join with other Allied nations in establishing a "United Nations Commission for the Investigation of War Crimes." Thereafter seventeen nations (Australia, Belgium, Canada, China, Czechoslovakia, France, Greece, India, Luxemburg, the Netherlands, New Zealand, Norway, Poland, South Africa, the United Kingdom, the United States, and Yugoslavia) formed the "United Nations War Crimes Commission" (UNWCC), which first met in October 1943. The Soviet Union was willing to participate, but disagreement arose over the demand that each of the sixteen Soviet Republics should be independently represented. No solution was reached, and Russia never was represented on the Commission. The UNWCC, under the chairmanship first of Sir Cecil Hurst and later (after 31 January 1945) of Lord Wright of Durley, became an important center of war crimes activities. It was, however, a "clearing-house" rather than an "operating agency"; it received and indexed charges filed by the member nations, and published lists of war crimes suspects and other valuable information, but it did not itself conduct investigations or institute prosecutions.

On 1 November 1943, at the Moscow Conference, the "Declaration on German Atrocities in Occupied Europe" was published by Britain, the Soviet Union, and the United States. This declaration was the third major step in the development of an international war crimes program; the participants announced:

> At the time of the granting of any armistice to any government which may be set up in Germany, those German officers and men and members of the Nazi party who have been responsible for or have taken a consenting part in the above atrocities, massacres and executions will be sent back to the countries in which their abominable deeds were done in order that they may be judged and pun-

ished according to the laws of these liberated countries and of the Free Governments which will be erected therein. Lists will be compiled in all possible detail from all these countries having regard especially to the invaded parts of the Soviet Union, to Poland and Czechoslovakia, to Yugoslavia and Greece, including Crete and other islands, to Norway, Denmark, the Netherlands, Belgium, Luxembourg, France and Italy.

. . . . .

The above declaration is without prejudice to the case of the major criminals whose offences have no particular geographical location and who will be punished by a joint decision of the Governments of the Allies.[2]

From the last paragraph sprang the later agreements under the authority of which the Nuremberg and other international trials were held. From the first paragraph developed the UNWCC "listing" machinery and the arrangements for exchange among the several Allied nations of Axis prisoners charged with the commission of war crimes in particular occupied countries.

As the war in Europe drew to a close, the treatment of war criminals emerged as one of the foremost tasks in shaping the peace. Almost everyone felt that exemplary punishment of those guilty of deliberately ordering or instigating mass atrocities was a precondition to cleansing the moral atmosphere of Europe, laden as it was with the odor of death and hatred of the ruthless invader. But even more fundamental was the growing awareness that the mere punishment of evil men—however merited and desirable that punishment might be—was not enough, and that the handling of war criminals could not be governed with that end alone in view. Thus Lord Simon, speaking in December 1943 in the House of Lords, declared:

From our point of view, the British point of view, we must never fail, however deeply we are tried, and however fundamentally we are moved by the sufferings of others, to do justice according to justice. There must be no mass executions of great numbers of name-

[2] United Nations Information Organisation, London, *Information Paper*, No. 1, pp. 11-12.

less people merely because there have been frightful mass executions on the other side. We shall never do any good to our own standards, to our own reputation and to the ultimate reform of the world if what we do is not reasonably consistent with justice. . . . whatever happens, do not let us depart from the principle that war criminals shall be dealt with because they are proved to be criminals, and not because they belong to a race led by a maniac and a murderer who has brought this frightful evil upon the world.[3]

And shortly before the end of the war in Europe, in March 1945, Walter Lippmann wrote:

. . . the problem posed by these notorious criminals is by far the most important, and what will be done with them will have a deep effect and considerable consequences on the law and morals of international society.[4]

In the meantime, the entire problem was under active consideration at the White House (Judge Samuel Rosenman), the State Department, the War Department (Secretary Stimson, the Judge Advocate General, Colonel Murray Bernays, and others), the Department of Justice (Attorney General Biddle and Assistant Attorney General Herbert Wechsler), and elsewhere in the United States Government. Important debates on the subject took place in Parliament in March 1945, and informal discussions among the diplomatic representatives of France, the Soviet Union, United Kingdom, and United States were conducted early in May during the San Francisco Conference. In the course of these talks, the United States presented to the other three governments a specific plan for the establishment of an International Military Tribunal to try the major European war criminals.[5]

At this point, American participation in the war crimes program was committed to the charge of Supreme Court Justice

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[3] Louise W. Holborn (*comp. and ed.*), *War and Peace Aims of the United Nations* (Boston: World Peace Foundation, 1943, 1948), Vol. II, pp. 449-50.

[4] *New York Herald Tribune*, 3 March 1945.

[5] *Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials, London, 1945*, U.S. Department of State, Publication 3080 (1949); a report on the international negotiations leading up to the London Agreement and Charter.

Robert H. Jackson, who, on 2 May 1945, was designated by the President as the Representative of the United States to negotiate with other nations for the establishment of an International Military Tribunal to try the major European war criminals, and as Chief of Counsel for their prosecution.[6] Justice Jackson assembled a staff of assistants, and enlisted the cooperation and participation of the War Crimes Branch of the Judge Advocate General's Department and the Office of Strategic Services (Major General William J. Donovan). After a series of conferences in occupied Germany, France, and England, Justice Jackson presented an interim report to President Truman on 6 June 1945.[7]

In this report—which attracted widespread public attention and stimulated much discussion and controversy among lawyers and men of public affairs—the basic legal concepts and general pattern of the Nuremberg trials[8] were outlined with remarkable prevision and clarity. The International Military Tribunal (IMT) was not to be concerned with traitors—Quisling, Laval, Lord Haw-Haw, and their ilk would be dealt with by their own countrymen—nor with the small man who committed war crimes or atrocities as a minor agent in a large-scale criminal plan designed and put into effect by his superiors. German civilians who lynched American airmen who had parachuted or crash-landed, concentration-camp guards, and other "small fry"—no matter how murderous—would be dealt with through the normal channels of military justice. Nor would the IMT handle crimes which were localized in one of the countries formerly occupied by Germany; pursuant to the Moscow Declaration, these accused would be sent back to the scene of their crimes for trial by the local authorities.

The IMT would thus be left free to deal with "major" war criminals whose offenses—in the language used at Moscow—

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6 Executive Order 9547, 2 May 1945, "Providing for Representation of the United States in Preparing and Prosecuting Charges of Atrocities and War Crimes Against the Leaders of the European Axis Powers and Their Principal Agents and Accessories." 10 *Federal Register* 4961.

7 See *Report of Robert H. Jackson, op. cit.*, pp. 42-54.

8 At that time, Nuremberg had not yet been selected as the site of the trial.

"have no particular geographical location." As will be seen, in numerous individual cases the distinction between "localized" and "non-localized" offenses was difficult to apply, and upon occasion it was ignored or overlooked, but as a general proposition it was workable enough. As Justice Jackson put it:[9]

Whom will we accuse and put to their defense? We will accuse a large number of individuals and officials who were in authority in the government, in the military establishment, including the General Staff, and in the financial, industrial, and economic life of Germany who by all civilized standards are provable to be common criminals. . . .

Our case against the major defendants is concerned with the Nazi master plan, not with individual barbarities and perversions which occurred independently of any central plan.

In addition to individuals:

We also propose to establish the criminal character of several voluntary organizations which have played a cruel and controlling part in subjugating first the German people and then their neighbors. It is not, of course, suggested that a person should be judged a criminal merely because he voted for certain candidates or maintained political affiliations in the sense that we in America support political parties. . . . Organizations such as the Gestapo and the S.S. were direct action units, and were recruited from volunteers accepted only because of aptitude for, and fanatical devotion to, their violent purposes.

. . . If in the main trial an organization is found to be criminal, the second stage will be to identify and try before regular military tribunals individual members not already personally convicted in the principal case. Findings in the main trial that an organization is criminal in nature will be conclusive in any subsequent proceedings against individual members. The individual member will thereafter be allowed to plead only personal defenses or extenuating circumstances, such as that he joined under duress. . . .

Turning to the question of what crimes these individuals or organizations should be charged with, the Justice declared:

There is, of course, real danger that trials of this character will

[9] *Op. cit.*, pp. 47-53, for this and following excerpts from his report.

become enmeshed in voluminous particulars of wrongs committed by individual Germans throughout the course of the war, and in the multitude of doctrinal disputes which are part of a lawyer's paraphernalia. We can save ourselves from those pitfalls if our test of what legally is crime gives recognition to those things which fundamentally outraged the conscience of the American people and brought them finally to the conviction that their own liberty and civilization could not persist in the same world with the Nazi power.

Those acts which offended the conscience of our people were criminal by standards generally accepted in all civilized countries, and I believe that we may proceed to punish those responsible in full accord with both our own traditions of fairness and with standards of just conduct which have been internationally accepted. I think also that through these trials we should be able to establish that a process of retribution by law awaits those who in the future similarly attack civilization.

The crimes to be charged would fall into three categories. The first category had been known as "war crimes" to soldiers and jurists for many years:

Atrocities and offenses against persons or property constituting violations of International Law, including the laws, rules, and customs of land and naval warfare. The rules of warfare are well established and generally accepted by the nations. They make offenses of such conduct as killing of the wounded, refusal of quarter, ill treatment of prisoners of war, firing on undefended localities, poisoning of wells and streams, pillage and wanton destruction, and ill treatment of inhabitants in occupied territory.

The second category involved offenses which were ancient and well established in domestic criminal law, but of more controversial standing in international penal law:

Atrocities and offenses, including atrocities and persecutions on racial or religious grounds, committed since 1933. This is only to recognize the principles of criminal law as they are generally observed in civilized states. These principles have been assimilated as a part of International Law at least since 1907. The Fourth Hague Convention provided that inhabitants and belligerents shall remain under the protection and the rule of "the principles of the law of nations, as they result from the usage established among civilized

peoples, from the laws of humanity and the dictates of the public conscience."

Such offenses had not yet received, but soon did, the descriptive title "crimes against humanity."

Finally, the making of aggressive war itself was to be charged as a criminal offense:

> Invasions of other countries and initiation of wars of aggression in violation of International Law or treaties.
>
> . . . . .
>
> Doubtless what appeals to men of good will and common sense as the crime which comprehends all lesser crimes, is the crime of making unjustifiable war. . . . International Law as taught in the Nineteenth and the early part of the Twentieth Century generally declared that war-making was not illegal and is no crime at law. . . . This, however, was a departure from the doctrine taught by Grotius, the father of International Law, that there is a distinction between the just and the unjust war—the war of defense and the war of aggression.
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> . . . After the shock to civilization of the last World War, however, a marked reversion to the earlier and sounder doctrines of International Law took place. By the time the Nazis came to power it was thoroughly established that launching an aggressive war or the institution of war by treachery was illegal and that the defense of legitimate warfare was no longer available to those who engaged in such an enterprise. It is high time that we act on the juridical principle that aggressive war-making is illegal and criminal.

While certain portions of Jackson's report immediately drew critical fire, his total conception was bold and imaginative and its impact on the war crimes "problem" was immediate and terrific. The liberated peoples of Europe, hate the Germans though they might, would not—as the St. James Declaration showed—be satisfied "simply by acts of vengeance." Jackson realized this, and sensed that what underlay this demand for action "through the channel of organised justice" was a deep awareness that "the fundamental problem confronting the world is to establish world order under the rule of law."[10] And the end

[10] *A Project for a World Law School* (Harvard Law School, 1948), p. 5.

of the war, as Jackson showed, offered a "rare moment" to strike at the heart of the problem:

> In untroubled times, progress toward an effective rule of law in the international community is slow indeed. Inertia rests more heavily upon the society of nations than upon any other society. Now we stand at one of those rare moments when the thought and institutions and habits of the world have been shaken by the impact of world war on the lives of countless millions. Such occasions rarely come and quickly pass. We are put under a heavy responsibility to see that our behavior during this unsettled period will direct the world's thought toward a firmer enforcement of the laws of international conduct, so as to make war less attractive to those who have governments and the destinies of peoples in their power.

Soon after publication of the Jackson report, the representatives of Britain, France, Russia, and the United States met in London[11] and hammered out an "Agreement . . . for the Prosecution and Punishment of the Major War Criminals of the European Axis" and an annexed "Charter of the International Military Tribunal."[12] Divergences of viewpoint were numerous, and several serious disagreements prolonged the discussion, but in general the Agreement (signed on 8 August 1945, and now known as the "London Agreement" or "London Charter") embodied the recommendations of the Jackson report. The permanent seat of the Tribunal was established at Berlin, and Nuremberg was selected as the site of the first trial. The signatory nations proceeded to designate the members of the Tribunal and the chief prosecutors. These latter filed an indictment against twenty-four individuals and six "groups or organizations" at Berlin on 18 October 1945, and the trial opened at Nuremberg on 20 November 1945.

In terms, the London Agreement envisaged a series of trials before the IMT.[13] However, Justice Jackson made it plain from the outset that the United States did not consider itself bound

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[11] The conference opened on 26 June 1945.

[12] The texts of the Agreement and Charter are printed in U.S. Department of State, *Executive Agreement Series* 472. See excerpt, *infra*, pp. 356-58.

[13] Charter, Article 22.

to participate in more than one such trial, and in fact only one was held. Furthermore, the four powers occupying Germany (which were the same as the four powers that signed the Agreement) realized that the complicated machinery of the IMT—which had to cope with four sets of judges and prosecutors and formidably polylingual proceedings—could not be economically or expeditiously utilized to try all those who fell within the Moscow Declaration category of "major criminals whose offenses have no particular geographical location." Supplementary and simpler judicial machinery was necessary.

To meet this need, on 20 December 1945, the four occupying powers, acting through the four Zone Commanders, promulgated Control Council Law No. 10:

> In order to give effect to the terms of the Moscow Declaration of 30 October 1943 and the London Agreement of 8 August 1945, and the Charter issued pursuant thereto and in order to establish a uniform legal basis in Germany for the prosecution of war criminals and other similar offenders, other than those dealt with by the International Military Tribunal. . . .[14]

In general, Law No. 10 adopted the London Agreement as a model,[15] although the language differed in numerous important particulars. Each of the four Zone Commanders was authorized to arrest suspected war criminals, and to establish "appropriate tribunals" for their trial. Elaborate provisions were included for the exchange of war crimes suspects among the four occupation zones, and for their delivery to other countries.

In the Soviet zone of occupation, so far as is known to the writer, little or nothing was ever done to carry Law No. 10 into effect. The British, in their zone, preferred to handle war crimes on a military court basis under the "Royal Warrant." In the French zone, at Rastatt (near Baden-Baden), one major trial under Law No. 10 and several of lesser interest have been held.

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[14] *Official Gazette of the Control Council for Germany*, Number 3, 31 January 1946 (Berlin: Allied Secretariat), p. 50. See text of Law, *infra*, pp. 358-63.

[15] The Charter of the International Military Tribunal for the Far East (approved 19 January 1946, and amended 26 April 1946) was also based largely on the London Agreement.

The principal defendant in the major trial was the well-known iron, steel, and coal magnate of the Saar, Hermann Roechling, who, interestingly enough, had been sought and tried *in absentia* as a war criminal by the French after the first World War.

In the American zone, a series of twelve trials have been held at Nuremberg under the provisions of Law No. 10. The tribunals before which these trials were conducted, constituted under the authority of Law No. 10, were established by the Military Governor (General McNarney) pursuant to Military Government Ordinance No. 7, promulgated on 18 October 1946.[15a] The twelve indictments named 185 individuals as defendants; the first indictment was filed on 25 October 1946, and the last of the twelve judgments was delivered on 14 April 1949.

While the international trials were taking place, a great number of other war crimes trials were held all over Europe before tribunals constituted by individual nations. Germans accused of war crimes against American troops (such as the perpetrators of the notorious "Malmedy massacre," and the participants in "lynchings" of American flyers) and the managing staffs of concentration camps overrun by American troops (Buchenwald, Flossenburg, Dachau) were tried at Dachau (in the American zone of occupation near Munich) before military tribunals established by the Judge Advocate's Department of the United States Army. In the British zone, German soldiers accused of atrocities or responsibility therefor (including some leading generals such as Falkenhorst and Student) and concentration camp personnel (Belsen) were tried before British military tribunals convoked pursuant to the "Royal Warrant." Field Marshal Kesselring and others were tried before similar British tribunals in Italy for atrocities against the Italian population (committed after the fall of Mussolini). Numerous German generals, SS and police leaders, and civilian officials were tried before tribunals in Belgium, Denmark, Greece, Holland, Norway, Poland, Russia, and Yugoslavia for atrocities committed in German-occupied territory. The European countries also tried their own pro-Nazi

[15a] See Ordinance No. 7 and amending Ordinance No. 11, *infra*, pp. 363-70.

"traitors," such as "Lord Haw-Haw" in England, Graziani in Italy, and Petain in France.

. War crimes trials were also under way in the Far East. Numerous Japanese officers and men were prosecuted for crimes against American troops and atrocities in the Philippines and elsewhere; the trials of Generals Yamashita and Homma are outstanding examples. Twenty-eight leading Japanese officials, military and civilian, were tried before the International Military Tribunal for the Far East. Eleven nations (Australia, Britain, Canada, China, France, India, the Netherlands, New Zealand, the Philippines, the Soviet Union, and the United States) were represented on the bench. This trial lasted over two years and resulted in the conviction, in November 1948, of all the defendants.

To summarize, the second World War has resulted in numerous war crimes trials of wide scope and great variety. It will be seen that they fall into three more or less definite categories. In the initial category are the first Nuremberg (IMT) trial and the Tokyo trial, conducted before tribunals composed of judges from four nations at Nuremberg and eleven at Tokyo, and constituted under *ad hoc* international agreements. The second includes the other Nuremberg trials and the Rastatt trials, held under international authority (Control Council Law No. 10) before tribunals established under the principal auspices of individual nations. The third is comprised of the thousands of trials held before national tribunals in Europe and the Far East. It might be said that such trials as those of Petain and "Lord Haw-Haw" comprise a fourth category.

The "Nuremberg trials" comprise the first trial before the IMT and the twelve trials under Control Council Law No. 10. Inasmuch as the IMT trial has been often described and widely discussed, and two and a half years have passed since the conviction of Goering and his co-defendants, it will be dealt with rather summarily, and the bulk of the ensuing discussion will be devoted to the twelve trials under Law No. 10.

II

THE LONDON AGREEMENT AND THE INTERNATIONAL MILITARY TRIBUNAL: HERMANN GOERING *et al*

The London Agreement was signed by representatives of the four powers occupying Germany "acting in the interests of all the United Nations."[16] Other governments of the United Nations were given the opportunity of "adhering" to the Agreement,[17] and nineteen[18] subsequently took advantage of this provision; by this action they endorsed the principles of the Agreement, and many of them sent observers and representatives to assist in the preparation of the prosecution's case at the trial.

Article 1 of the Agreement authorized the establishment of an International Military Tribunal "for the trial of war criminals whose offenses have no particular geographical location whether they be accused individually or in their capacity as members of organizations or groups or in both capacities." The "Charter" of the IMT, annexed to the Agreement, specified that the IMT should "consist of four members, each with an alternate," one member and his alternate to be designated by each of the four signatories. The heart of the Charter was Article 6, defining the crimes within the jurisdiction of the Tribunal. These crimes, corresponding to the "legal charges" outlined in Justice Jackson's report (and later included in the four counts of the indictment), were described as "crimes against peace" (the planning or waging of aggressive war, or conspiracy for the accomplishment thereof), "war crimes" (violations of the laws and customs of war), and "crimes against humanity"

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16 The language is quoted from the preamble to the Agreement, which was signed by Justice Jackson for the United States, Robert Falco for France, I. T. Nikitchenko and A. N. Trainin for Russia, and the Lord Chancellor (Lord Jowitt) for the United Kingdom.

17 Agreement, Article 5.

18 Australia, Belgium, Czechoslovakia, Denmark, Ethiopia, Greece, Haiti, Honduras, India, Luxemburg, the Netherlands, New Zealand, Norway, Panama, Paraguay, Poland, Uruguay, Venezuela, and Yugoslavia.

(atrocities and other inhumane acts "committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal").

Others among the recommendations in Jackson's report were adopted in the Charter. The fact that a defendant had acted pursuant to "superior orders" was ruled out as a defense, but might be considered in mitigation.[19] The Tribunal was empowered to declare that a "group or organization" to which a defendant had belonged was a "criminal organization"; members of organizations declared criminal could thereafter be prosecuted on account of their membership.[20] Jackson had emphasized that "fair hearings for the accused are, of course, required to make sure that we punish only the right men and for the right reasons," and the Charter contained numerous safeguards directed to that end.[21]

That the representatives of four great nations with distinct and highly developed judicial traditions could agree at all upon a charter for an international criminal court was an impressive demonstration of how imperative and wide-spread was the demand—first expressed in the St. James Declaration—for retribution "through the channels of organized justice . . . in a spirit of international solidarity." No doubt the Charter borrowed more heavily from the common law system of jurisprudence—the basis of English and American law—than the civil law, from which French, Russian, German, and most other European legal systems are derived. But it was a genuinely international legal document. For instance, the provision that the defendants might take the witness stand and testify subject to cross-examination[22] is customary criminal procedure in England and the United States but quite unknown in continental legal systems; conversely, the provision that the defendants might make statements

19 Charter, Article 8. Likewise, under Article 7, the defendants were foreclosed from claiming immunity on the ground that they had acted in an official capacity.

20 Charter, Articles 9, 10, and 11.

21 Charter, Articles 16 *et seq.*

22 Charter, Article 24 (g).

to the Tribunal not under oath and not subject to cross-examination[23] is wholly foreign to Anglo-American practice, but familiar to continental lawyers.

The Indictment

The indictment, too, was "international" on its face. Counts One and Two, charging conspiracy and crimes against peace, were drafted in principal part by the English and Americans; following common law practice, the charges were reasonably precise, but the evidence in support thereof was not set forth in detail. Counts Three and Four, charging war crimes and crimes against humanity, were based largely on evidence of particular atrocities supplied by the Russians, the French, or other recently German-occupied countries, and reflected the continental practice of "pleading" the details in the statement of charges.

Count One of the indictment was patterned after Jackson's declaration (in his June 1945 report) that "our case against the major defendants is concerned with the Nazi master plan." In effect, it charged that all the defendants, with numerous confederates, engaged in a gigantic "common plan or conspiracy" to acquire "totalitarian control of Germany," to mobilize the German economy for war, to construct a huge military machine for conquest, and to overrun and subjugate Austria, Czechoslovakia, Poland, and the other victims of German arms; and, in the course of all the foregoing, to commit numerous war crimes and crimes against humanity.

Count Two of the indictment contained only the formal allegation that all the defendants did commit crimes against peace by planning, preparing, initiating, and waging wars of aggression against twelve named countries.[24] Count Three ac-

[23] Charter, Article 24 (j).

[24] The twelve (in the order of the initiation of the wars) were Poland; United Kingdom and France; Denmark and Norway; Belgium, the Netherlands, and Luxemburg; Yugoslavia and Greece; Soviet Russia; and the United States. It is noteworthy that Austria and Czechoslovakia were not included. *Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 November 1945—1 October 1946* (Nuremberg, Germany, 1947–49), Vol. I, p. 42.

cused the defendants of violating the laws and customs of war, specifying the murder and ill-treatment of millions of civilians in the German-occupied countries, deportation of other millions to slave labor, murder and ill-treatment of prisoners of war, killing of hostages, plunder and looting and unjustified devastation, forcing non-German civilians to swear allegiance to Hitler, and despotically "Germanizing" occupied areas, particularly Alsace and Lorraine and parts of Poland. In Count Four, charging "crimes against humanity," were incorporated all the allegations of Count Three, but in addition Count Four included accusations based on events in Germany (and Austria and Czechoslovakia) prior to the outbreak of the war. Particular stress was laid on the imprisonment of Jews and political opponents of Nazism at Dachau, Buchenwald, and elsewhere, and on general mistreatment and persecution of Jews and other political, racial, and religious groups by the Nazis.

The twenty-four defendants included, in addition to Hermann Goering and Rudolf Hess (the No. 2 and No. 3 political figures of the Third Reich until its last two or three years), the Foreign Ministers (Ribbentrop and von Neurath), the Navy commanders in chief (Raeder and Doenitz), the two leading generals in Hitler's own military staff (Keitel and Jodl), and prominent Nazi party leaders or administrators such as Ley, Rosenberg, Frick, Schirach, Kaltenbrunner, Hans Frank, Funk, Streicher, Sauckel, Speer, Seyss-Inquart, and Bormann (who was never discovered and was tried *in absentia*). The dock also included the ubiquitous von Papen and the enigmatic Dr. Schacht, the prominent industrialist Gustav Krupp von Bohlen, and one Hans Fritzsche, a division chief in the deceased Goebbels' Propaganda Ministry.[25] In addition, the indictment named six "groups or organizations"—including the SS, the SA, and the

[25] Most of the leading figures of the Third Reich who survived the end of the war were taken prisoner by British or American forces. The Soviet Union wished to have some of its own prisoners in the dock, and from four or five suggested defendants in Soviet custody the chief prosecutors chose Raeder (obviously a sound selection) and Fritzsche.

"General Staff and High Command" of the Wehrmacht[26]—against which "declarations of criminality" were asked.[27]

Early in October 1945 the IMT assembled in Berlin, and chose the British member, Lord Justice Geoffrey Lawrence, as its President.[28] They received the indictment (dated 6 October and filed 18 October 1945) signed by the four chief prosecutors,[29] and then moved to Nuremberg, where preparations for the trial were in progress at the Palace of Justice. The IMT obtained and approved defense counsel selected by the accused, adopted rules to govern its proceedings, and took other preliminary steps. The defendant Ley committed suicide in the Nuremberg jail late in October, and on 15 November the Tribunal ruled that Gustav Krupp could not be tried, because of his physical and mental condition. A motion by a majority of the chief prosecutors (the British prosecutor did not join) to amend the indictment by adding Gustav's son, Alfried Krupp, was denied by the Tribunal two days later. Accordingly, when the trial opened on 20 November 1945, the defendants comprised twenty-one individuals physically present in the dock and the absent Bormann; the six accused "groups or organizations" were, in a practical sense, defendants too.

The Trial and Judgment

Burdened with vexing administrative and organizational questions, harassed by misunderstandings generated by a polyglot bench and bar, and almost buried under a mountain of evidence through which it painfully worked its way, the Interna-

26 Also the "Reich Cabinet," the "Leadership Corps" of the Nazi Party, and the "Gestapo."

27 Appendixes to the indictment set forth the positions held by the defendants, defined the composition of the "groups or organizations," and listed the treaties charged to have been violated.

28 The other members were Francis Biddle (United States), H. Donnedieu de Vabres (France), and I. T. Nikitchenko (Soviet Union). The alternates were Sir Norman Birkett (United Kingdom), John J. Parker (United States), R. Falco (France) and A. Volchkov (Soviet Union).

29 The indictment was signed by Justice Jackson for the United States, François de Menthon for France, R. Rudenko for the Soviet Union, and the Attorney-General (Sir Hartley Shawcross) for the United Kingdom.

tional Military Tribunal had problems enough quite apart from the formidable issues of law and fact which it was called upon to judge. Despite all these difficulties, the trial was a dignified and often impressive judicial proceeding. The ingenious system for simultaneous translation worked acceptably from the outset, and excellently as the interpreters gained practical experience. Lord Justice Lawrence presided with a rare combination of firmness and flexibility. If the prosecution's presentation was not untouched by mediocrity (some fifty lawyers appeared at the podium) and suffered from hasty organization, these defects did not loom large in the whole picture. Defense counsel were indefatigable and many made excellent appearances; the principal disadvantage under which most of them labored was their unfamiliarity with the technique of handling witnesses in open court (in continental practice witnesses are usually questioned by the judges), a shortcoming which they shared, however, with the French and Russian prosecution counsel.

The trial ran its nine-months course, now dull, now gripping, sometimes deeply moving. As month after month passed, and press and public lost interest in the case as a "spectacle," the judicial foundations of the trial were strengthened by this very fact, and by the evident determination of all participants to master the unwieldy agglomeration of facts and issues and produce a coherent synthesis.

Despite many imperfections and not a few internal inconsistencies, the Tribunal's judgment achieved this synthesis to a remarkable degree.[30] A substantial portion was devoted to a narrative, based largely on the evidence submitted under Count One (the "conspiracy count") of the indictment, summarizing

[30] Following the practice of many American appellate tribunals, the United States member and alternate equipped themselves with legal assistants of very high calibre. A large share of credit for the judgment should be given to the able supporting work of these assistants, among them Professor Quincy Wright of the University of Chicago, Herbert Wechsler, former Assistant Attorney General and Professor of Law at Columbia University, James H. Rowe, former Assistant to the Attorney General, and Capt. Adrian L. Fisher, now General Council of the Atomic Energy Commission. Lt. Col. A. M. S. Neave, B.A.O.R., of the Tribunal's Secretariat, also made a signal contribution.

the story of the Nazi seizure of power, the consolidation of that power in the "Third Reich," and the preparations for German aggrandizement by force of arms. The judgment then traced the march of conquest, relying heavily on captured German diplomatic and military documents, and concluded that "certain of the defendants planned and waged aggressive wars against 12 nations, and were therefore guilty of this series of crimes."[31] Turning to Counts Three and Four of the indictment ("war crimes" and "crimes against humanity"), the Tribunal summarized the evidence ("overwhelming in its volume and its detail") with respect to atrocities, which the court found to have been "the result of cold and criminal calculation," arising out of the "conception of total war."[32]

The Tribunal dealt with fundamental legal questions in four sections entitled respectively "The Law of the Charter," "The Law as to the Common Plan or Conspiracy," "The Law relating to War Crimes and Crimes against Humanity," and "The Accused Organizations." In the first, the IMT discussed the defense contention that the charge of aggressive war should be dismissed because "no sovereign power had made aggressive war a crime at the time that the alleged criminal acts were committed," and that "there can be no punishment of crime without a pre-existing law." This contention the IMT rejected, holding that aggressive war had been a crime under international penal law at least since the Pact of Paris (Kellogg-Briand Pact) of 1928.[33] In this section they also rejected certain other

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[31] *Trial of the Major War Criminals, op. cit.*, Vol. I, p. 216. Curiously enough the Tribunal did not list the twelve. From express statements elsewhere in the opinion, it is clear that Poland, Denmark, Norway, Belgium, Holland, Luxemburg, Greece, Yugoslavia, and the Soviet Union comprise nine of the twelve. The indictment charged that the wars against these nine countries and also those against England, France, and the United States were aggressive wars, and it is the writer's view that England, France, and the United States *must* be the other three, since the indictment did *not charge* that the invasions of Austria and Czechoslovakia (or any other acts) constituted aggressive wars. In the later "Ministries Case," it was expressly held that the wars with England, France, and the United States were "aggressive wars." See *infra*, pp. 330-35.

[32] *Ibid.*, p. 227.

[33] *Ibid.*, pp. 218-22.

general defenses, such as the contention that international law is concerned with the actions of sovereign states, and provides no punishment for individuals ("crimes against international law are committed by men, not by abstract entities, and only by punishing individuals . . . can . . . international law be enforced"), and that the defendants were under Hitler's orders and therefore not responsible for their acts, saying:

> That a soldier was ordered to kill or torture in violation of the international law of war has never been recognized as a defense to such acts of brutality, though . . . the order may be urged in mitigation of the punishment. The true test . . . is not the existence of the order, but whether moral choice was in fact possible.[34]

In the second section, devoted to the conspiracy charge, the Tribunal decided (for technical reasons based on the particular language of the London Charter) that the charge of conspiracy to commit war crimes and crimes against humanity should be disregarded, and that "only the common plan to prepare, initiate, and wage aggressive war" needed to be considered.[35] The court adopted a rather narrow view of the concept of conspiracy,[36] not so evident in its general language as in its decision as to the guilt or innocence of particular defendants. In this portion of the judgment the IMT declared that "the conspiracy must be clearly outlined in its criminal purpose. It must not be too far removed from the time of decision and of action"; but the court held that "the evidence establishes the common planning . . . by certain of the defendants" and rejected the defense argument that "common planning cannot exist where there is complete dictatorship," saying:

> Hitler could not make aggressive war by himself. He had to have the co-operation of statesmen, military leaders, diplomats, and business men. When they, with knowledge of his aims, gave him their co-operation, they made themselves parties to the plan he had ini-

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[34] *Ibid.*, pp. 222-24.

[35] *Ibid.*, p. 226.

[36] See Henry L. Stimson, "The Nuremberg Trial: Landmark in Law," *Foreign Affairs*, Vol. 25, No. 2 (January 1947), p. 179, at 187-88.

tiated. They are not to be deemed innocent because Hitler made use of them, if they knew what they were doing.[37]

In the third "legal" section, the IMT disposed of the contention that the defendants could not be held to compliance with the laws of war as set forth in the Hague and Geneva Conventions because several of the belligerents in the second World War (notably the Soviet Union) were not parties to these conventions. This argument, said the court, overlooked the fact that the conventions were merely declaratory of pre-existing and well-established laws of war "recognized by all civilized nations," and that the laws of war are binding on all, irrespective of whether a particular government has signed a particular convention.[38]

In this section, too, the Tribunal dealt summarily (and, in the writer's view, unsatisfactorily) with the concept of "crimes against humanity." The laws of war are operative only in wartime; to what extent do atrocities committed in peace-time constitute offenses against international law? Under what circumstances are atrocities committed within the boundaries of a single nation—such as the prewar persecution of Jews, Gypsies, and others by the Nazis—matters of international judicial concern? These nettles the court did not grasp. An avenue of escape was found in the language of the Charter:

The policy of persecution, repression, and murder of civilians in Germany before the war of 1939, who were likely to be hostile to the Government, was most ruthlessly carried out. The persecution of Jews during the same period is established beyond all doubt. To constitute Crimes against Humanity, the acts relied on before the outbreak of war must have been in execution of, or in connection with, any crime within the jurisdiction of the Tribunal. The Tribunal is of the opinion that revolting and horrible as many of these crimes were, it has not been satisfactorily proved that they were done in execution of, or in connection with, any such crime. The Tribunal therefore cannot make a general declaration that the acts before 1939

[37] *Trial of the Major War Criminals,* Vol. I, pp. 225-26.

[38] *Ibid.,* pp. 253-54.

were Crimes against Humanity within the meaning of the Charter. . . .[39]

After the outbreak of war, however, the atrocities were clearly committed in connection with aggression and therefore were within the IMT's jurisdiction:

> . . . insofar as the inhumane acts charged in the Indictment, and committed after the beginning of the war, did not constitute War Crimes, they were all committed in execution of, or in connection with, the aggressive war, and therefore constituted Crimes against Humanity.[40]

In short, atrocities committed *during the war* by Germans against Germans, or against nationals of the "satellite" allies of Germany (such as Hungary and Rumania), although not in violation of the laws of war (which apply only between belligerents), were given international juridical recognition as crimes against humanity. Atrocities committed prior to the war, however shocking, were declared, under the language of the Charter, to be beyond the IMT's judicial pale.

Finally, the IMT wrestled with the novel questions presented by the charges against the "groups or organizations" such as the SS and the "General Staff"—questions which had been troublesome throughout the trial.[41] The Tribunal noted that, under the London Charter (Article 10) and Control Council Law No. 10 (Article II, 1 [d]), members of organizations declared criminal by the IMT could be convicted of the crime of membership, and remarked:

> This is a far reaching and novel procedure. Its application, unless properly safeguarded, may produce great injustice.

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[39] *Ibid.*, p. 254. The Charter defined "crimes against humanity" as including "persecutions on political, racial or religious grounds *in execution of or in connection with any crime within the jurisdiction of the Tribunal.*" (*Italics added.*)

[40] *Ibid.*, pp. 254-55.

[41] The IMT devoted three days (28 February and 1 and 2 March) to special arguments on the legal and practical problems involved in the "organizational" charges. The testimony in defense of the organizations was so extensive that most of it was taken before Commissioners of the Tribunal, and only the most important witnesses were heard by the court itself.

. . . criminal guilt is personal, and . . . mass punishments should be avoided. If satisfied of the criminal guilt of any organization or group, this Tribunal should not hesitate to declare it to be criminal because the theory of "group criminality" is new, or because it might be unjustly applied by some subsequent tribunals. On the other hand, the Tribunal should make such declaration of criminality so far as possible in a manner to insure that innocent persons will not be punished.[42]

The nub of the court's decision on this thorny issue was that no one should be convicted on the ground of membership unless he either had "knowledge of the criminal purposes or acts of the organization" or was "personally implicated in the commission" of criminal acts. "Membership alone is not enough to come within the scope of these declarations."[43] The IMT went on to recommend that, in subsequent trials of individuals on the charge of membership, the classifications and penalties should, so far as possible, be uniform in the four occupation zones; that no punishment for membership pursuant to Law No. 10 should exceed the punishment prescribed under the new German "De-Nazification Laws";[44] and that no one should be punished for membership both under Law No. 10 and the De-Nazification Law.

As for the organizations themselves, the IMT found little difficulty in declaring the "Leadership Corps" of the Nazi Party and the SS and Gestapo to be criminal organizations as to those who became or remained members after 1 September 1939. The Storm Troopers (SA) had ceased to be of great importance after the Roehm purge (1934), and the Tribunal declined to declare the SA criminal. The Reich Cabinet also escaped because it had ceased to function "as a group or organization" after 1937, and in any event was "so small that members could be conveniently

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42 *Ibid.*, p. 256.

43 *Ibid.*

44 The De-Nazification Law of 5 March 1946, adopted in Bavaria, Wuerttemberg-Baden, and Greater Hesse, provided a maximum term of ten years imprisonment. In fundamental theory, this law was a "security" or "political cleansing" measure rather than a penal statute in the strict sense.

tried in proper cases without resort to a declaration."[45] The "General Staff and High Command" was not subjected to a declaration for the same reason, and also because the court felt that the military leaders did not constitute an "organization" or a "group" within the meaning of the Charter.[46] However, the Tribunal commented that:

> Although the Tribunal is of the opinion that the term "group" in Article 9 must mean something more than this collection of military officers, it has heard much evidence as to the participation of the officers in planning and waging aggressive war, and in committing War Crimes and Crimes against Humanity. This evidence is, as to many of them, clear and convincing.
>
> They have been responsible in large measure for the miseries and suffering that have fallen on millions of men, women, and children. They have been a disgrace to the honorable profession of arms. . . .
>
> Many of these men have made a mockery of the soldier's oath of obedience to military orders. When it suits their defense they say they had to obey; when confronted with Hitler's brutal crimes, which are shown to have been within their general knowledge, they say they disobeyed. The truth is they actively participated in all these crimes, or sat silent and acquiescent, witnessing the commission of crimes on a scale larger and more shocking than the world has ever had the misfortune to know. This must be said.
>
> Where the facts warrant it, these men should be brought to trial so that those among them who are guilty of these crimes should not escape punishment.[47]

The concluding portion of the judgment, dealing with the guilt or innocence of the individual defendants, is perhaps the least satisfying part of the opinion. The decision in each case required that the general principles laid down earlier in the judgment be interpreted and applied to a particular set of facts established by the proof. With twenty-two such sets, some of which presented very delicate problems, the IMT was unable to avoid a number of pitfalls, and troublesome inconsistencies are readily apparent.

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[45] *Ibid.*, pp. 257-76.

[46] *Ibid.*, pp. 276-78.

[47] *Ibid.*, pp. 278-79.

With respect to Counts One (considered by the IMT as a charge of conspiracy to plan or wage aggressive war) and Two (the substantive crime of planning or waging aggressive war) an interesting reversal took place. The prosecution (in this instance the British and Americans) obviously considered conspiracy the broader and more inclusive charge, and had accordingly indicted all of the defendants under Count One,[48] but had only charged eighteen of the defendants under Count Two.[49] The IMT, however, took just the opposite view, and treated conspiracy as the more restricted charge. Eight defendants only were convicted under Count One, and these eight were also convicted under Count Two. All eight were either close personal or Party confidants of Hitler (Goering, Hess, Ribbentrop, and Rosenberg) or were top military or diplomatic figures who were privy to the most secret plans and attended conferences where Hitler personally revealed his intentions (Goering, Ribbentrop, Keitel, Raeder, Jodl, and von Neurath). But four others —Frick, Funk, Doenitz, and Seyss-Inquart—acquitted of the conspiracy charge were nevertheless convicted under Count Two. Frick as an administrator and bureaucrat, Funk as an economic planner, Doenitz as commander of all German submarines, and Seyss-Inquart as a Nazi pro-consul in occupied Poland and the Netherlands, had planned or waged aggressive war, although they had not conspired.[50]

The six defendants not charged under Count Two were acquitted under Count One.[51] Also acquitted were four defendants who were charged on both counts—Schacht, Sauckel, von Papen, and Speer. Despite Papen's international notoriety, he was not close to Hitler and his activities as Ambassador to

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48 Including Ley and Krupp, who were not tried.

49 The six not charged under Count Two were Kaltenbrunner, Frank, Streicher, Schirach, Fritzsche, and Bormann.

50 The opinion is clear that Funk planned and Doenitz waged, but is not clear as to which element was relied on in the cases of Frick and Seyss-Inquart.

51 Had Frank, for example, been charged under Count Two, it is difficult to see how he could have escaped conviction, as he was Seyss-Inquart's immediate superior in occupied Poland.

Austria and later to Turkey were too slender a basis for conviction. The acquittals of Schacht, Sauckel, and Speer are more difficult to analyze. The Tribunal's unspoken premise seems to have been that Schacht deserted the Nazis too soon (he lost his struggle with Goering in 1936 and 1937, and was dismissed by Hitler from the Presidency of the Reichsbank in January 1939), and that Sauckel and Speer attained high positions too late (1942), to support their conviction. But on the face of the judgment it is hard (at least for the writer) to see why Sauckel and Speer were less guilty of "waging" aggressive war than Doenitz or Frick or Seyss-Inquart; as to Sauckel, the court said only that he was not "sufficiently involved,"[52] and as to Speer that—

> His activities in charge of German armament production were in aid of the war effort in the same way that other productive enterprises aid in the waging of war; but the Tribunal is not prepared to find that such activities involve engaging in the common plan to wage aggressive war as charged under Count One or waging aggressive war as charged under Count Two.[53]

Schacht escaped because the evidence failed to establish "beyond a reasonable doubt" that "Schacht did in fact know of the Nazi aggressive plans."[54]

The guilt or innocence of the defendants under Counts Three and Four ("war crimes" and "crimes against humanity") was, in general, much easier to determine. Schacht and Papen had not been charged under these counts. Of the remaining twenty defendants, all were found guilty as charged[55] except Hess and Fritzsche. Hess flew to England in June 1941, after the war-time atrocities had begun but before they had reached their peak, and his connection with them could not be satisfactorily established.

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[52] *Trial of the Major War Criminals,* Vol. I, pp. 330-331.

[53] *Ibid.,* pp. 330-331.

[54] *Ibid.,* p. 310.

[55] Raeder and Doenitz were charged and convicted only on Count Three, and Streicher and Schirach only on Count Four. The other sixteen were charged and found guilty on both of these Counts.

Fritzsche was a well-known Nazi radio commentator and propagandist but a man of altogether minor stature in the Nazi hierarchy, and his acquittal would not be of much significance but for the glaring contrast between it and the conviction and sentencing to death of Julius Streicher, also a Nazi propagandist. In appearance and other personal qualities Fritzsche certainly compared more than favorably with Streicher, and the IMT concluded that Fritzsche's broadcasts were not "intended to incite the German People to commit atrocities on conquered peoples,"[56] whereas Streicher's publications constituted "incitement to murder and extermination at the time when Jews in the East were being killed under the most horrible conditions."[57]

The reading of the judgment was concluded on 1 October 1946, and the same day the IMT sentenced Goering, Ribbentrop, Keitel, Kaltenbrunner, Rosenberg, Frank, Frick, Streicher, Sauckel, Jodl, Seyss-Inquart, and Bormann to death by hanging. Hess, Funk, and Raeder were sentenced to life imprisonment, and Doenitz, Schirach, Speer, and von Neurath to terms ranging from ten to twenty years. Schacht, Papen, and Fritzsche were acquitted and freed.[58] The Soviet member (General Nikitchenko) dissented from the acquittals of Schacht, Papen, and Fritzsche, and from the refusal to declare the "Reich Cabinet" and the "General Staff" criminal organizations, and declared that Hess should have been sentenced to death. All the sentences were confirmed by the Allied Control Council for Germany;[59] the death sentences (except for the Goering suicide) were carried out and the other convicted defendants were incarcerated in Berlin at the Spandau jail, which is almost if not quite the only enterprise in Berlin still functioning on a quadripartite basis.

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56 *Ibid.*, p. 338.

57 *Ibid.*, p. 304.

58 All three were subsequently given prison sentences by denazification tribunals, which are still being appealed.

59 Under Article 29 of the London Charter.

III

CONTROL COUNCIL LAW NO. 10: NUREMBERG MILITARY TRIBUNALS AND THE OFFICE, CHIEF OF COUNSEL FOR WAR CRIMES

While the trial of Goering and his co-defendants before the IMT bore a definite relation to the quadripartite occupation of Germany under the Allied Control Council,[60] it was not an integral part of the occupation machinery.[61] The Nuremberg trials under Law No. 10, however, were carried out under the direct authority of the Control Council, as manifested in that law, and their judicial machinery was established by and was part of the occupational administration for the American zone, the Office of Military Government (OMGUS).[62]

In the American zone, the basis for the changeover was laid in January 1946, when President Truman amended the Executive Order under which Justice Jackson had been appointed.[63] The amendment provided that, upon Jackson's resignation, he should be succeeded by "a Chief of Counsel for War Crimes to be appointed by the United States Military Governor for Germany."[64] Preparations for trials under Law No. 10 were begun in May 1946, while the IMT trial was still in process, and soon after its

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60 Thus the IMT was established "after consultation with the Control Council for Germany" (London Agreement, Article 1), and the sentences imposed by the IMT could be (but were not) reduced by the Control Council (Charter, Article 29).

61 The Chief Prosecutors and Members of the IMT reported directly to their respective governments, not to the Control Council.

62 Similarly, the French zone war crimes trials at Rastatt under Law No. 10 were carried out under the aegis of the French occupational authorities (Gouvernement Militaire Zone Française d'Occupation—GMZFO).

63 Executive Order 9547, of 2 May 1945.

64 Executive Order 9679, of 16 January 1946. This Order also directed Jackson to appoint a Deputy Chief of Counsel to prepare for the prosecution of war criminals other than those then being prosecuted before the IMT. The writer was so appointed by Justice Jackson on 29 March 1946. The texts of the two Orders are printed in *Report of Robert H. Jackson, op. cit.*, pp. 21 and 430-31.

conclusion, immediately upon Justice Jackson's resignation,[65] the Office, Chief of Counsel for War Crimes was established (on 24 October 1946) as an organ of Military Government, and the writer was appointed Chief of Counsel for War Crimes. The first indictment under Law No. 10 was filed the following day.[66]

As stated heretofore, Law No. 10 was adapted from the London Charter. In the definitions of the crimes, however, there were two significant differences: "crimes against peace" were defined to include "invasions" as well as "wars" (thus furnishing a basis for charging the Austrian and Czechoslovakian conquests as crimes against peace), and the definition of "crimes against humanity" omitted the wording relied on by the IMT[67] in declining to take cognizance of atrocities perpetrated prior to the outbreak of the war. Likewise, "membership in categories of a criminal group or organization declared criminal by the International Military Tribunal" was made a punishable offense.

Law No. 10 authorized the four Zone Commanders to designate "tribunals" for the trial of offenses thereunder and to determine the "rules and procedure" of such tribunals. This was accomplished, in the American zone, by Military Government Ordinance No. 7, promulgated by the Military Governor on 18 October 1946. This ordinance established[68] "Military Tribunals," each to consist of three or more qualified American lawyers,[69] to be designated by the Military Governor. The Chief

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65 In the meantime, discussions had been under way with respect to holding a second quadripartite trial under the London Agreement, in which leading German industrialists would be the defendants. Such a trial was favored by the French and Soviet prosecutors, but the British were lukewarm. In his final report to the President (7 October 1946), Justice Jackson recommended against any further proceedings before a quadripartite bench, and thereafter the idea fell into limbo.

66 *United States* v. *Karl Brandt et al* (the "Medical Case"), Case No. 1, filed 25 October 1946.

67 ". . . in execution of or in connection with any crime within the jurisdiction of the Tribunal." See pp. 265-66 and footnote 39, *supra*.

68 Ordinance No. 7, Article II.

69 In paragraph (c) of Article II it was provided that the Military Governor might enter into agreements with one or more of the other three Zone Commanders for a joint trial, in which case the tribunals could include properly qualified lawyers designated by the other nation or nations. This provision was never utilized.

of Counsel for War Crimes was empowered to determine who should be tried before these tribunals and to file the indictments. The procedural provisions were drawn from the London Charter, with some modifications suggested by experience under the IMT. In order to avoid the futile and time-wasting procedure of trying over and over again such general questions as whether Germany's attack on Poland was an "aggressive war," and to confine the issues at the proceedings to the individual responsibility of the defendants, it was provided (Article X) that—

> The determinations of the International Military Tribunal in the judgments . . . that invasions, aggressive acts, aggressive wars, crimes, atrocities or inhumane acts were planned or occurred, shall be binding on the tribunals established hereunder and shall not be questioned except insofar as the participation therein or knowledge thereof by any particular person may be concerned. Statements of the International Military Tribunal in the judgment . . . constitute proof of the facts stated, in the absence of substantial new evidence to the contrary.[70]

The judgments of the tribunals as to guilt or innocence were "final and not subject to review," but the Military Governor was empowered to reduce the sentences. By subsequent amendment[71] to the ordinance, provision was made for sittings of all the tribunals *en banc* to resolve conflicts between rulings of the several tribunals.

Pursuant to these laws, ordinances, and other documents, the Nuremberg trials under Law No. 10 were carried on by two administratively distinct organizations, each of which was a division of Military Government. One was composed of the "Military Tribunals"—the judges themselves, functioning administratively through a Secretariat, headed by a Secretary General. The other was the prosecution staff—the Office, Chief of Counsel for War Crimes.

The judges were "recruited" in the United States by the De-

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[70] Ordinance No. 7, Article X.

[71] The amendment was made by Military Government Ordinance No. 11, of 17 February 1947.

partment of the Army, which submitted the names to the Military Governor for advance clearance. Thereafter the judges were officially appointed, and the several tribunals constituted, by order of the Military Governor. In all, 32 individuals served as judges (or alternate judges)[72] in the twelve cases, of whom 25 were or had been state court judges;[73] the others included a law school dean and prominent practicing attorneys. As the tribunals were constituted, they were numbered from one to six,[74] and during the winter of 1947–48 there were actually six trials (involving over one hundred defendants) simultaneously in process.

The Chief of Counsel's responsibilities, therefore, were by no means confined to the actual trial of cases. It had to be determined who should be tried, and what disposition should be made of individuals who were not to be tried; this required a vast amount of apprehension and location work, interrogation, and examination of documents without end. To fulfill its varied and unusual mission,[75] the Office, Chief of Counsel was divided into a legal division (lawyers, with linguistically qualified research assistants), evidence division (document files, location and interrogation of suspects, witnesses, etc.), language division (court reporting and interpreting, and translating), reproduction division (photostating and mimeographing of documents), and administrative division (general administrative services). Approximately one hundred prosecution lawyers were employed (not all at one time), or about one lawyer for two defendants; each defendant, however, was represented by at least one, gen-

72 Five individuals were appointed as alternates, of whom three ultimately served as judges on later tribunals.

73 Fourteen had served on the highest court of a state, and the others on intermediate appellate benches or at *nisi prius*. Several federal judges had accepted invitations to sit at Nuremberg, but Chief Justice Vinson shortly thereafter directed that no members of the federal judiciary should serve there.

74 Thereafter, new tribunals were constituted with the number of one of the earlier tribunals which had completed its case and adjourned *sine die*.

75 Because the Office, Chief of Counsel was established before there were any tribunals or Secretariat, it had to undertake many matters (such as court reporting and translation) which otherwise would have been handled by the Secretariat. Later, when the Secretariat was established, the Chief of Counsel's office continued to handle these matters in order to avoid the delays of an administrative changeover.

erally two, and often three or more lawyers, so the defense bar far outnumbered the prosecution bar.[76] At peak strength (July–November 1947), the Nuremberg trials required the services of nearly nine hundred American and allied employees and about an equal number of Germans. Some idea of the magnitude of the undertaking may be gathered from the fact that in one twelve-month period (1 September 1947–1 September 1948) the language division translated and stencilled 133,262 pages of material,[77] or about 520 pages per day.

[76] The language and reproduction divisions served both the prosecution and the defense.

[77] Divided between prosecution and defense in the amounts of 45,387 and 87,875, respectively. In addition, of course, the language division was interpreting and reporting all of the court proceedings.

IV

THE TWELVE NUREMBERG TRIALS UNDER LAW NO. 10

DURING the closing months of 1945, when Law No. 10 was being drafted, it was thought by some that zonal tribunals established under Law No. 10 would try the hundreds of thousands of members of organizations ultimately declared criminal by the IMT. This was not done. In the American zone, the tribunals established at Nuremberg under Law No. 10 were composed of professional judges or experienced jurists, and were constituted for the trial of major culprits, many of whom bore an overall responsibility for the crimes of the Third Reich. Such tribunals were not suitable for the "assembly-line" proceedings which the "membership trials" would have entailed had they all been carried out at Nuremberg. The Nuremberg tribunals tried 177 individual defendants,[78] and many of these were members of organizations declared criminal by the IMT and were charged with and tried for that offense among others.[79] But the great bulk of SS officers and Nazi Party officials were tried, if they were tried at all, before local German "denazification" boards (*Spruchkammern*)[80]

The task of determining who should be tried in the American zone under Law No. 10 was begun in May 1946. It had been largely completed by May 1947, by which time seven indict-

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78 One hundred and eighty-five were indicted in the twelve cases, but four of the accused committed suicide and four became too ill to stand trial.

79 No one, however, was indicted for membership alone. But several defendants were acquitted on all other charges and were convicted of membership (with knowledge or participation) only.

80 Usually the members (and other suspects under the denazification law) were tried in the city or town where they resided. By administrative decision, the less serious cases were tried earliest, so as to avoid the prolonged confinement of minor offenders awaiting trial. The major offenders were "reached" during the latter part of 1948, by which time the "temper" of the *Spruchkammern* had been radically affected by world events and the revival of German nationalism. Some of the acquittals and light sentences of more or less notorious Nazis and other offenders were sensational and, the writer believes, very ominous.

ments against 100 defendants had been filed, and the general scope of the remaining indictments determined, and was finished in November 1947, when the twelfth and last indictment was filed. For the most part, those indicted were in American custody, but there was a substantial interchange of war crimes suspects with the British, and some with the French and the Poles.[81] The general basis upon which the Chief of Counsel decided whom to indict under Law No. 10, was stated as follows:

> . . . one of the first and most important responsibilities of my office was to determine, in the light of the best available information, where the deepest individual responsibility lay for the manifold international crimes committed under the aegis of the Third Reich. It should be emphasized that the Nurnberg trials have been carried out for the punishment of crime, not for the punishment of political or other beliefs, however mistaken or vicious. Consequently, in the selection of defendants, the question whether a given individual was or was not a "Nazi" in a political or party sense has not been governing. No one has been indicted before the Nurnberg Military Tribunals unless, in my judgment, there appeared to be substantial evidence of criminal conduct under accepted principles of international penal law.
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> Nor would it have been fair or wise to favor or discriminate against any particular occupation, profession or other category of persons. To preserve the integrity of the proceedings, it was necessary to scrutinize the conduct of leaders in all occupations, and let the chips fall where they might. . . .[82]

In each of the four largest cases between twenty-one and twenty-four defendants were named, in six others between twelve and eighteen, in another case six, and in one case only a single defendant. In order to narrow the factual scope of the trials, and to lend point and emphasis, each of the twelve cases

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81 For example, when the Chief of Counsel decided to have a "medical" trial, the British turned over a number of SS and military doctors held by them and suspected of medical atrocities, so that all medical suspects could be tried in a single proceeding. Conversely, the British decided to try a number of suspects in Italy for war crimes committed against Italians after the fall of Mussolini, and the Chief of Counsel agreed to the transfer of Field Marshal Kesselring (then in American custody) to the British for this purpose.

82 Preliminary Report to the Secretary of the Army by the Chief of Counsel for War Crimes, 12 May 1948, pp. 2-3.

was "centred" on a particular occupational group of defendants. While there was considerable overlapping between the several classifications, the twelve trials may be divided into five general categories:

Category	*Number of defendants*[83]	*Case Number*
Professional men (doctors and lawyers)	39	Cases 1 and 3
SS and Police	56	Cases 4, 8, and 9
Industrialists and Financiers	42	Cases 5, 6, and 10
Military leaders	26	Cases 7 and 12
Government Ministers	22	Cases 2 and 11

The procedure at these trials followed closely that worked out before the IMT, though many novel questions arose for which the IMT furnished no precedent. Most of the defense counsel who had appeared before the IMT remained for the Law No. 10 trials and were, accordingly, rather more "at home" in the courtroom than the prosecution counsel, most of whom were newly arrived from the United States[84] and were facing novel research and procedural questions—to say nothing of linguistic difficulties—for the first time. The mechanical and administrative problems were simplified by the disappearance of the French and Russian languages from the courtroom,[85] but were enormously aggravated as the number of trials simultaneously in progress rose from one to six.[86]

[83] The "number of defendants" is simply the total number indicted in the cases in the right-hand column, and takes no account of overlapping, exceptions, suicides and illness, etc. Thus three of the twenty-three defendants in the "medical case" were not doctors, but administrative people involved in medical affairs. Likewise Milch, the sole defendant in Case No. 2, has been classified as a "government minister" since the principal charge against him was responsibility for deportation to enslavement and forced labor of foreign workers, incurred in the exercise of his authority as a member of the Central Planning Board. But Milch was a Field Marshal in the Luftwaffe and might, therefore, be classified as a "military leader." Such illustrations could be multiplied.

[84] Only a very few members of the American prosecution staff before the IMT remained for the Law No. 10 trials.

[85] Except, of course, when witnesses testified in other languages, the proceedings were conducted in German and English, using the simultaneous interpretation system.

[86] Between December 1946 and December 1947 the number of cases simultaneously in process rose from one to six and the number of defendants in such

The "Medical Case" was the first to open and the second to close.[87] Officially designated *United States* v. *Karl Brandt et al* (Case No. 1), it was heard by a bench composed of Walter B. Beals (Chief Judge of the Supreme Court of Washington) presiding, Harold L. Sebring (Judge of the Supreme Court of Florida), and Johnson T. Crawford (Judge of the District Court of Oklahoma), with Victor C. Swearingen (formerly Assistant Attorney General of Michigan) as alternate member.

The indictment (filed 25 October 1946) named twenty-three defendants. Karl Brandt had, for a time, been one of Hitler's personal physicians and had risen at the age of forty to become Reich Commissioner for Health and Sanitation—the highest medical position in the Reich, directly subordinate to Hitler, with supervisory authority over all military and civilian medical services—and a major general in the SS. The other principal defendants included Lt. General Siegfried Handloser (Chief of the Medical Services of the entire Wehrmacht), Lt. General Oscar Schroeder (Chief of the Medical Service of the Luftwaffe), Karl Gebhardt (Chief Surgeon of the SS with the rank of major general and President of the German Red Cross), and the distinguished physicians Paul Rostock (Chief of the Office for Medical Science and Research under Brandt, and Dean of the Medical Faculty of the University of Berlin) and Gerhard Rose (renowned specialist in tropical medicine, who during the war was a consultant to Handloser and Schroeder). Six other defendants were staff doctors or medical consultants in the Luftwaffe, and six others (including one woman) were in the SS medical service.[88] Himmler's personal adjutant (Rudolf Brandt),

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cases from 25 to over 100, with corresponding increases in the necessary number of judges, prosecution and defense counsel, interpreters and translators, document clerks, typists, etc.

87 The "Milch Case" (Case No. 2), involving only one defendant, was the second to open and the first to close.

88 Including SS Major General Genzken (Chief of the Medical Service of the Waffen SS).

two other non-medical administrative officials,[89] and two "civilian" physicians[90] were also indicted.

The principal count[91] of the indictment charged the defendants with criminal responsibility for cruel and frequently murderous "medical experiments" performed, without the victims' consent, on concentration camp inmates, prisoners of war, and others. At Dachau, it was charged, experiments were carried out for the benefit of the Luftwaffe in order to investigate the limits of human existence at high altitudes, and to determine the most effective treatment for flyers who had been severely frozen:

> The experiments were carried out in a low-pressure chamber in which the atmospheric conditions and pressures prevailing at high altitude (up to 68,000 feet) could be duplicated. . . . Many victims died as a result of these experiments and others suffered grave injury. . . .
>
> . . . In one series of experiments the subjects were forced to remain in a tank of ice water for periods up to three hours. . . . After the survivors were severely chilled, rewarming was attempted by various means. In another series of experiments, the subjects were kept naked outdoors for many hours at temperatures below freezing. . . .[92]

At Dachau, Buchenwald, and elsewhere, concentration camp inmates were deliberately infected with malaria, epidemic jaundice, typhus, or other diseases in order to test vaccines and other drugs. Methods of sterilization and techniques for making sea water drinkable were among the other studies in which the

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89 Victor Brack (Chief Administrative Officer in the Fuehrer's NSDAP Chancellery), and Wolfram Sievers (Manager of the "Ahnenerbe Society," sponsored by Himmler for "ideological" and "cultural" pseudo-research).

90 Kurt Blome (Deputy Reich Health Leader in the NSDAP) and Adolf Pokorny (a private physican who was charged with suggesting methods of mass sterilization to Himmler).

91 There were four counts. Count Two was the principal count. Count Three charged the same acts as constituting "crimes against humanity," as the victims included German nationals. Count One charged a conspiracy to commit the crimes described in Counts Two and Three. Count Four charged certain defendants with membership in the SS.

92 Indictment, Count Two, Par. 6 (A, B).

inmates served as guinea-pigs. In addition to these "experiments," Karl Brandt and three other defendants were accused of participation in the so-called "euthanasia" program, which "involved the systematic and secret execution of the aged, insane, incurably ill, of deformed children and other persons, by gas, lethal injections, and divers other means in nursing homes, hospitals and asylums. Such persons were regarded as 'useless eaters' and a burden to the German war machine. The relatives of these victims were informed that they died from natural causes, such as heart failure."[93] Rudolf Brandt and Sievers were also charged with responsibility for the murder of 112 Jews in the interests of Nazi pseudo-science:

> One hundred and twelve Jews were selected for the purpose of completing a skeleton collection for the Reich University of Strasbourg. Their photographs and anthropological measurements were taken. Then they were killed. Thereafter, comparison tests, anatomical research, studies regarding race, pathological features of the body, form and size of the brain, and other tests, were made. The bodies were sent to Strasbourg and defleshed.[94]

The trial opened on 9 December 1946 and closed 19 July 1947.[95] In general, the defense did not dispute that the experiments described in the indictment had been carried out, though some effort was made to establish that certain experiments were not as dangerous as was charged. For the most part, the defense raised questions of individual criminal responsibility: the defendants were acting under superior orders; they had no power to prevent the experiments; some of the subjects volunteered, others were convicts who would have been executed in any event; in other countries, too, medical experimentation on human beings was practiced; euthanasia has strong advocates in all countries. The trial record contains much material of great

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[93] Indictment, Count Two, Par. 9.

[94] *Ibid.*, Par. 7.

[95] The prosecution staff for the "Medical Case" was headed by Mr. James McHaney, of Little Rock, Arkansas, with Mr. Alexander G. Hardy, of Boston, Massachusetts, as his chief assistant. Dr. Leo Alexander, of Boston, Massachusetts, was the medical consultant.

interest to physicians (especially psychiatrists) as well as to lawyers. The Tribunal was impressively earnest and, indeed, resourceful in its search for the truth; for example, an eminent American doctor called by the prosecution as an expert witness[96] was cross-examined by several of the defendants themselves[97] on matters with respect to which their counsel felt technically incompetent.

The Tribunal's judgment (19 August 1947) declared:

> Judged by any standard of proof the record clearly shows the commission of war crimes and crimes against humanity substantially as alleged in counts two and three of the indictment. Beginning with the outbreak of World War II criminal medical experiments on non-German nationals, both prisoners of war and civilians, including Jews and "asocial" persons, were carried out on a large scale in Germany and the occupied countries. These experiments were not the isolated and casual acts of individual doctors and researchists working solely on their own responsibility, but were the product of coordinated policy-making and planning at high governmental, military, and Nazi Party levels, conducted as an integral part of the total war effort. . . .[98]

Fifteen defendants were convicted of criminal responsibility for these crimes. Karl Brandt, Gebhardt, Rudolf Brandt, and four others[99] were sentenced to death by hanging; Handloser, Schroeder, Rose, and two more,[100] to life imprisonment; and three others to long terms.[101] A sixteenth defendant (Poppendick) was convicted of membership in the SS with knowledge of its criminal practices, and sentenced to ten years' imprisonment.

Seven defendants were acquitted.[102] The Tribunal gave full effect to the common law principle that guilt must be established "beyond a reasonable doubt." Thus, while the defendant

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96 Dr. Andrew C. Ivy, Vice President of the University of Illinois.

97 Rose, Ruff, and Beiglboeck.

98 Transcript, p. 11373.

99 Mrugowsky, Sievers, Brack, and Hoven.

100 Genzken and Fischer.

101 Becker-Freyseng (20 years), Beiglboeck (15 years), and Herta Oberheuser, the woman defendant (20 years).

102 Rostock, Blome, Ruff, Romberg, Weltz, Schaefer, and Pokorny.

Schaefer was given a "clean bill of health" because the prosecution's case was entirely deficient, the acquittals of Ruff, Romberg, and Weltz were based squarely on the "reasonable doubt" principle:

> The issue on the question of the guilt or innocence of these defendants is close. . . . It cannot be denied that there is much in the record to create at least a grave suspicion that the defendants Ruff and Romberg were implicated in criminal experiments at Dachau. However, virtually all of the evidence which points in this direction is circumstantial in its nature. . . .
>
> . . . before a court will be warranted in finding a defendant guilty on circumstantial evidence alone, the evidence must show such a well-connected and unbroken chain of circumstances as to exclude all other reasonable hypotheses but that of the guilt of the defendant . . . the legal test is whether the evidence is sufficient to satisfy beyond a reasonable doubt . . . those who . . . must assume the responsibility for finding the facts.
>
> On this particular specification it is the conviction of the Tribunal that the defendants Ruff, Romberg and Weltz, must be found not guilty.[103]

If the Tribunal dealt fairly with the individual defendants, it likewise dealt wisely with the fundamental issues. In the most interesting part of the judgment, the Tribunal laid down ten general standards to which those who use human subjects for scientific experimentation must conform:

> The great weight of the evidence before us is to the effect that certain types of medical experiments on human beings, when kept within reasonably well-defined bounds, conform to the ethics of the medical profession generally. The protagonists of the practice of human experimentation justify their views on the basis that such experiments yield results for the good of society that are unprocurable by other methods or means of study. All agree, however, that certain basic principles must be observed in order to satisfy moral, ethical and legal concepts:
>
> 1. The voluntary consent of the human subject is absolutely essential.
>
> This means that the person involved should have legal capacity

[103] Transcript, pp. 11504-5.

to give consent; should be so situated as to be able to exercise free power of choice, without the intervention of any element of force, fraud, deceit, duress, overreaching, or other ulterior form of constraint or coercion; and should have sufficient knowledge and comprehension of the elements of the subject matter involved as to enable him to make an understanding and enlightened decision. This latter element requires that before the acceptance of an affirmative decision by the experimental subject there should be made known to him the nature, duration, and purpose of the experiment; the method and means by which it is to be conducted; all inconveniences and hazards reasonably to be expected; and the effects upon his health or person which may possibly come from his participation in the experiment.

The duty and responsibility for ascertaining the quality of the consent rests upon each individual who initiates, directs or engages in the experiment. It is a personal duty and responsibility which may not be delegated to another with impunity.

2. The experiment should be such as to yield fruitful results for the good of society, unprocurable by other methods or means of study, and not random and unnecessary in nature.

3. The experiment should be so designed and based on the results of animal experimentation and a knowledge of the natural history of the disease or other problem under study that the anticipated results will justify the performance of the experiment.

4. The experiment should be so conducted as to avoid all unnecessary physical and mental suffering and injury.

5. No experiment should be conducted where there is an *a priori* reason to believe that death or disabling injury will occur; except, perhaps, in those experiments where the experimental physicians also serve as subjects.

6. The degree of risk to be taken should never exceed that determined by the humanitarian importance of the problem to be solved by the experiment.

7. Proper preparations should be made and adequate facilities provided to protect the experimental subject against even remote possibilities of injury, disability, or death.

8. The experiment should be conducted only by scientifically qualified persons. The highest degree of skill and care should be required through all stages of the experiment of those who conduct or engage in the experiment.

9. During the course of the experiment the human subject should be at liberty to bring the experiment to an end if he has reached

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the physical or mental state where continuation of the experiment seems to him to be impossible.

10. During the course of the experiment the scientist in charge must be prepared to terminate the experiment at any stage, if he has probable cause to believe, in the exercise of the good faith, superior skill and careful judgment required of him that a continuation of the experiment is likely to result in injury, disability, or death to the experimental subject.[104]

The sentences were confirmed by the Military Governor, and, after the United States Supreme Court (by a five to three vote, Justice Jackson not participating) declined to review the proceedings, the executions were carried out at Landsberg prison, where Hitler was confined after the Munich Putsch of 1923, and where the prison terms of the other convicts under Law No. 10 are to be served. The trial and judgment as a whole are, the writer believes, a signal contribution both to international law and to medical jurisprudence. Noting the disclosures at the trial, the World Medical Association recently adopted a "modern version" of the ancient Hippocratic oath, in which the doctor vows:

I will not permit consideration of race, religion, nationality, party politics or social standing to intervene between my duty and my patient. I will maintain the utmost respect for human life from the time of its conception. Even under threat I will not use my knowledge contrary to the laws of humanity.[105]

The third Nuremberg trial—entitled *United States* v. *Josef Altstoetter et al* (Case No. 3)—has become known as the "Justice Case" because, as the prosecution put it, the defendants "were the embodiment of what passed for justice in the Third Reich."[106] All were officials—as judges, prosecutors, or ministerial officers—of the judicial system of Nazi Germany. Franz Guertner, who became Minister of Justice in Hitler's cabinet in 1933, died early in 1941, and Georg Thierack, Minister of Justice from August 1942 until the end of the war, committed suicide in a

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104 Transcript, pp. 11373-75.

105 See "A Note on Medical Ethics," by Albert Deutsch, published in *Doctors of Infamy—The Story of the Nazi Medical Crimes* (Henry Schuman, Inc., 1949).

106 Transcript, p. 34.

British internment camp (October 1946) upon hearing over the radio that his trial was imminent. Roland Freisler, who succeeded Thierack in 1942 as President of the infamous "People's Court," was killed in an air raid near the end of the war. Thus the three men who would otherwise have been the principal defendants were not in the dock, and possibly for this reason the "Justice Case"—to jurists perhaps the most interesting of all the Nuremberg trials—has received scant attention in the press or professional literature.[107]

The principal defendant in the Nuremberg dock was Franz Schlegelberger, Under Secretary (*Staatssekretaer*) of the Justice Ministry under Guertner, and Acting Secretary from Guertner's death until Thierack's accession. Tried with Schlegelberger were Thierack's two successive Under Secretaries, Curt Rothenburger and Herbert Klemm, and four other former officials of the Ministry of Justice.[108] The Chief Public Prosecutor of the Reich (Ernst Lautz) and an assistant were likewise defendants, as were three Chief Justices of the "Special Courts" at Nuremberg and Stuttgart.[109]

The nub of the prosecution's charge was that the defendants were guilty of "judicial murder and other atrocities, which they committed by destroying law and justice in Germany, and then utilizing the emptied forms of legal process for persecution, enslavement, and extermination on a vast scale."[110] The indictment charged that the defendants in the Ministry of Justice had participated in drafting and enacting unlawful orders and decrees,

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107 The case is reported and commented on in *Law Reports of Trials of War Criminals: Selected and Prepared by the United Nations War Crimes Commission* (Published for the United Nations War Crimes Commission by His Majesty's Stationery Office, London, 1948), Vol. VI.

108 Alstoetter, von Ammon, Joel, and Mettgenberg. Two other officials of the Ministry of Justice—Westphal and Engert—were indicted but not tried; Westphal committed suicide in Nuremberg jail before the trial opened, and subsequently the Tribunal declared a mistrial as to Engert, whose physical condition prevented his presence in court. Accordingly, sixteen were indicted and fourteen were tried.

109 Paul Barnickel was Lautz' assistant, Hermann Cuhorst was Chief Justice at Stuttgart, and Oswald Rothaug and his successor Rudolf Oeschey, at Nuremberg.

110 Prosecution's opening statement, Transcript, p. 36.

such as those which discriminated against Poles, Jews, and others in occupied territory, and the notorious "Nacht und Nebel" (Night and Fog) decree under which civilians in the occupied territories were spirited away to Germany for secret trial before special "courts." The defendants were also charged with imprisoning and killing Jews, and other members of groups to which the Nazis were hostile, by trials which were a flagrant travesty of the judicial process, and divers other offenses.[111]

The trial opened[112] on 5 March 1947, before Military Tribunal III, originally composed of Carrington T. Marshall (former Chief Justice of the Supreme Court of Ohio) presiding, James T. Brand (of the Supreme Court of Oregon), and Mallory B. Blair (of the Court of Civil Appeals of Texas), with Justin W. Harding (former judge in Alaska and Assistant Attorney General of Ohio) as alternate. Judge Marshall was obliged because of poor health to retire from the case, and thereafter Judge Brand presided and Judge Harding became a member of the Tribunal. The taking of evidence was concluded in October, and the judgment was rendered on 4 December 1947.

The judgment of Military Tribunal III in the "Justice Case" was unusually comprehensive in scope and penetrating in content. International law, the court declared,

> is not the product of statute. Its content is not static. The absence from the world of any governmental body authorized to enact substantive rules of international law has not prevented the progressive development of that law. After the manner of the English common law it has grown to meet the exigencies of changing conditions.
>
> . . . the circumstance which gives to principles of international conduct the dignity and authority of law is their general acceptance as such by civilized nations, which acceptance is manifested by in-

111 The indictment was filed 4 January 1947. Its structure was similar to that in the "Medical Case"; Count One charged conspiracy, Count Two war crimes, Count Three crimes against humanity (the same type of acts as in Count Two committed against non-belligerent civilians), and Count Four membership in criminal organizations.

112 In charge of the prosecution of the "Justice Case" was Hon. Charles M. LaFollette, Deputy Chief Counsel (formerly Congressman from Indiana), assisted by Alfred M. Wooleyhan, Robert D. King, and Sadie B. Arbuthnot.

ternational treaties, conventions, authoritative textbooks, practice and judicial decisions.[113]

This being so,

It would be sheer absurdity to suggest that the *ex post facto* rule, as known to constitutional states, could be applied to a treaty, a custom, or a common law decision of an international tribunal, or to the international acquiescence which follows the event. To have attempted to apply the *ex post facto* principle to judicial decisions of common international law would have been to strangle that law at birth.[114]

However,

As a principle of justice and fair play, the rule in question will be given full effect. As applied in the field of international law that principle requires proof before conviction that the accused knew or should have known that in matters of international concern he was guilty of participation in a nationally organized system of injustice and persecution shocking to the moral sense of mankind, and that he knew or should have known that he would be subject to punishment if caught. Whether it be considered codification or substantive legislation, no person who knowingly committed the acts made punishable by C. C. Law 10 can assert that he did not know that he would be brought to account for his acts. . . .[115]

Not only was the law enforced at Nuremberg "international law"; the Nuremberg tribunals were themselves international in character:

The jurisdictional enactments of the Control Council, the form of the indictment, and the judicial procedure prescribed for this Tribunal are not governed by the familiar rules of American criminal law and procedure. This Tribunal, although composed of American judges schooled in the system and rules of common law, is sitting by virtue of international authority and can carry with it only the broad principles of justice and fair play which underlie all civilized concepts of law and procedure.[116]

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[113] Transcript, p. 10624.

[114] *Ibid.*, p. 10636.

[115] *Ibid.*, p. 10639.

[116] *Ibid.*, pp. 10648-49.

Passing to the facts of the case at hand, the Tribunal traced the rapid degeneration of the judiciary under the Third Reich, through all the laws, decrees, and administrative steps by which the judicial system was distorted and perverted into an instrumentality of the dictatorship. Thereafter, the legal machinery was used to commit the crimes charged in the indictment:

> The charge, in brief, is that of conscious participation in a nation-wide governmentally organized system of cruelty and injustice, in violation of the laws of war and of humanity, and perpetrated in the name of law by the authority of the Ministry of Justice, and through the instrumentality of the courts. The dagger of the assassin was concealed beneath the robe of the jurist.[117]

The defendants, of course, argued that they were bound to obey and enforce Hitler's decrees, even if those conflicted with international law. But this defense did not prevail; in reply, the Tribunal declared:

> The conclusion to be drawn from the evidence . . . is clear: In German legal theory Hitler's law was a shield to those who acted under it, but before a Tribunal authorized to enforce international law, Hitler's decrees were a protection neither to the Fuehrer himself nor to his subordinates, if in violation of the law of the community of nations.[118]

Turning to the individual defendants, the Tribunal outlined Schlegelberger's participation in the drafting and enactment of criminal decrees, and then dealt with his major defense:

> Schlegelberger presents an interesting defense, which is also claimed in some measure by most of the defendants. . . . He contends that if the functions of the administration of justice were usurped by the lawless forces under Hitler and Himmler the last state of the nation would be worse than the first. He feared that if he were to resign, a worse man would take his place. As the event proved, there is much truth in this also. . . . Upon analysis this plausible claim of the defense squares neither with the truth, logic or the circumstances.

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117 *Ibid.*, p. 10649.

118 *Ibid.*, p. 10687.

The evidence conclusively shows that in order to maintain the Ministry of Justice in the good graces of Hitler and to prevent its utter defeat by Himmler's police, Schlegelberger and the other defendants who joined in this claim of justification took over the dirty work which the leaders of the State demanded, and employed the Ministry of Justice as a means for exterminating the Jewish and Polish populations, terrorizing the inhabitants of occupied countries, and wiping out political opposition at home. That their program of racial extermination under the guise of law failed to attain the proportions which were reached by the pogroms, deportations, and mass murders by the police, is cold comfort to the survivors of the "judicial" process and constitutes a poor excuse before this Tribunal. . . .[119]

The decision with respect to Oswald Rothaug, Presiding Judge of the Special Court at Nuremberg from 1937 to 1943, who was convicted only on the charge involving crimes against humanity (Count Three of the indictment), was far-reaching in its implications. The Tribunal based its decision largely on persecution of members of "racial" or "national" groups, and especially stressed the sentence of death which Rothaug had imposed on a Nuremberg Jew. The victim, who was 68 years old and head of the Jewish community, was accused under the "racial pollution" laws of having sexual intercourse with a young "Aryan" girl. The Tribunal found:

Prior to the trial, the defendant Rothaug called on Dr. Armin Baur, medical Counsellor for the Nuremberger Court, as the medical expert for the Katzenberger case. He stated to Baur that he wanted to pronounce a death sentence and that it was therefore necessary for the defendant to be examined. This examination, Rothaug stated, was a mere formality since Katzenberger "would be beheaded anyhow." To the doctor's reproach that Katzenberger was old and it seemed questionable whether he could be charged with race defilement, Rothaug stated:

"It is sufficient for me that the swine said that a German girl had sat upon his lap."

. . . . .

During the proceedings, Rothaug tried with all his power to encourage the witnesses to make incriminating statements against the

119 *Ibid.*, pp. 10793-94.

defendants. Both defendants were hardly heard by the Court. Their statements were passed over or disregarded. During the course of the trial, Rothaug took the opportunity to give the audience a National Socialist lecture on the subject of the Jewish question. . . .[121]

On the basis of these facts, Rothaug was found guilty:

The evidence established beyond a reasonable doubt that Katzenberger was condemned and executed because he was a Jew. . . . in conformity with the policy of the Nazi State of persecution, torture, and extermination of these races. The defendant Rothaug was the knowing and willing instrument in that program of persecution and extermination.[122]

Schlegelberger, Rothaug, and two other defendants[123] were sentenced to life imprisonment, and four others[124] received ten-year terms. Thierack's first deputy, Rothenberger, was also convicted and sentenced to a seven-year term; Alstoetter was convicted only of membership in the SS (with knowledge of its criminal activities), and drew a five-year sentence. Four defendants were acquitted.[125]

SS and Police

Over sixty Nuremberg defendants—about one third of all those tried in the twelve cases—were full-time "officers" or civilian officials of the SS. Moreover, other defendants in the "Medical," "Justice," "Flick," "Farben," and "Ministries" cases held high rank in the SS[126] and rendered service to Himmler frequently or occasionally, but these others had duties or occupations which were, in the main, unconnected with their SS membership. Most (fifty-six) of the "full-time" SS defendants were tried in three cases, each of which involved one principal type of SS activity.

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121 *Ibid.*, pp. 10894-96.

122 *Ibid.*, p. 10901.

123 Klemm and Oeschey.

124 von Ammon, Joel, Lautz, and Mettgenberg.

125 Barnickel, Nebelung, Petersen, and Cuhorst.

126 For example, Karl Brandt (Medical), Otto Steinbrinck (Flick), and Hans Lammers (Ministries).

Heinrich Himmler's "Schutzstaffeln der NSDAP," commonly known as the "SS," was a small, compact organization in the early years of the Third Reich, supposedly composed of a Nazi "aristocracy of race and blood," which provided bodyguards for Hitler and high Party officials and guards for concentration camps. But in 1936 Himmler became head of the German police, and in ensuing years he assumed numerous other offices; simultaneously various SS "regiments" and "brigades" were armed and trained and these became known as the "Waffen SS" (Armed SS), which fought in the field with the Army during the war, and eventually attained a peak strength of some thirty divisions. As a result, the SS became a sprawling empire which required a large headquarters for command and administration. This headquarters was divided, by 1943, into about a dozen "Main Offices" (*Hauptaemter*). Each of the three Nuremberg "SS cases" was concerned with one or more of these offices.

In the "Pohl Case" (*United States* v. *Oswald Pohl et al,* Case No. 4), the defendants were the Chief (Pohl) and seventeen other officials of the Economic and Administrative Department (*Wirtschaft und Verwaltungshauptamt,* or "WVHA") of the SS. The WVHA was itself divided into five divisions (*Amtsgruppen*), of which three handled SS financial and legal matters, procured SS uniforms, billets, and other equipment, and constructed and maintained SS buildings, such as barracks, fortifications, and camps, including concentration camps. The fourth division was in direct charge of the administration of concentration camps, and the fifth managed the economic enterprises (mines, quarries, brick factories, etc.) owned and operated by the SS, usually at or near concentration camps. In addition to Pohl (who held the rank of lieutenant general in the SS), the defendants included two deputy chiefs[127] and fifteen other SS officials[128] who headed various divisions or subdivisions of the

[127] August Frank and Georg Loerner (lieutenant general and major general of the SS respectively) were successively deputies to Pohl.

[128] All but one of the other defendants were SS officers with SS ranks ranging from captain to brigadier general. The defendant Hohberg was a "civilian employee" of the SS, without SS rank.

WVHA. Within the sphere of their respective activities, the indictment[129] accused them of criminal responsibility for murders and other crimes committed against the inmates of concentration camps constructed, maintained, and administered by the WVHA. Some of these crimes were committed in the camps themselves, and others in SS mines or factories operated by the WVHA, where concentration camp inmates were used as slave labor.

The "Pohl Case" was tried before Military Tribunal II, composed of Robert M. Toms (Judge of the Circuit Court of Michigan) presiding, F. Donald Phillips (Judge of the Superior Court of North Carolina), and Michael A. Musmanno (Judge of the Court of Common Pleas of Pennsylvania), with John L. Speight of Alabama as alternate judge. The case opened on 8 April and closed 22 September 1947,[130] and judgment was delivered on 3 November 1947.[131] Pohl and three other defendants[132] were sentenced to death by hanging, and eleven defendants received prison terms ranging from ten years to life. Three defendants were acquitted.[133] Perhaps the outstanding feature of the judgment is the Tribunal's unqualified condemnation of forced labor, irrespective of the physical conditions thereof:

Under the spell of National Socialism, these defendants today are only mildly conscious of any guilt in the kidnapping and enslavement of millions of civilians. The concept that slavery is criminal *per se* does not enter into their thinking. Their attitude may be summarized thus: "We fed and clothed and housed those prisoners as best we could. If they were hungry and cold, so were the Germans.

129 Like the "Medical" and "Justice" indictments, the "Pohl" indictment consisted of four counts. Count Two charged certain acts as "war crimes," and Count Three charged the same acts as "crimes against humanity." Count One charged conspiracy, and Count Four membership in the SS, a criminal organization.

130 The prosecution's case was handled by Jack W. Robbins of New York City, under the general supervision of James McHaney. Mr. Robbins was assisted by Baucum Fulkerson of Little Rock, Arkansas, James R. Higgins of Pottsville, Pennsylvania, and Peter W. Walton of Monticello, Georgia.

131 Judge Musmanno joined in the judgment of the Tribunal, but also filed a concurring opinion.

132 Georg Loerner, Eirenschmalz, and Sommer.

133 Vogt, Scheide, and Klein.

If they had to work long hours under trying conditions, so did the Germans. What is wrong in that?" When it is explained that the Germans were free men working in their own homeland for their own country, they fail to see any distinction. The electrically charged wire, the armed guards, the vicious dogs, the sentinel towers—all those are blandly explained by saying, "Why, of course. Otherwise, the inmates would have run away." They simply cannot realize that the most precious word in any language is "liberty.". . .

Slavery may exist even without torture. Slaves may be well fed and well clothed and comfortably housed, but they are still slaves if without lawful process they are deprived of their freedom by forceful restraint. We might eliminate all proof of ill-treatment, overlook the starvation and beatings and other barbarous acts, but the admitted fact of slavery—compulsory uncompensated labor—would still remain. There is no such thing as benevolent slavery. Involuntary servitude, even if tempered by humane treatment, is still slavery.[134]

Following the rendition of judgment, defense counsel filed the customary petitions for reduction of sentence with the Military Governor under Article XVII of Ordinance No. 7. When these petitions were brought to the attention of the judges, the Tribunal decided to treat them as petitions for rehearing or reconsideration. Pursuant to appropriate order, the Tribunal reconvened and invited the submission of supplemental briefs by defense counsel. After consideration thereof, the Tribunal rendered a supplemental judgment on 11 August 1948, under which one of the death sentences was altered to life imprisonment,[135] and three other prison sentences were reduced.[136]

The second "SS case" was known as the "RuSHA Case" (*United States* v. *Ulrich Greifelt et al,* Case No. 8). The defendants were fourteen officials of several SS organizations whose common objective, according to the indictment, was "to proclaim and safeguard the supposed superiority of 'Nordic' blood, and to exterminate and suppress all sources which might 'dilute' or 'taint' it." These fantastically named and needlessly complicated

134 Transcript, pp. 8063, 8065-66.

135 Georg Loerner.

136 Kiefer's, from life to twenty years; Fanslau's, from twenty-five to twenty years; and Bobermin's, from twenty to fifteen years.

organizations — grotesque monuments to Nazi mythology — included the staff of the "Reich Commissioner for the Strengthening of German Folkdom" headed by Greifelt[137] (an SS lieutenant general), the "Main Race and Resettlement Office" (*Rasse und Siedlungshauptamt,* or "RuSHA") headed successively by the defendants Otto Hofmann and Richard Hildebrandt (both SS lieutenant generals), the so-called "Lebensborn" (Well of Life) Society, and the "Main Office for Repatriation of Racial Germans," headed by the defendant Werner Lorenz (still another SS lieutenant general). The other ten defendants (including one woman) were subordinate officials in these offices.[138] The indictment[139] charged the defendants with criminal responsibility for many features of the Nazi "racial" program, including the kidnapping of "racially valuable" children from the occupied countries for "Germanization"; the forced "Germanization" of other foreign nationals who were considered "Ethnic Germans"; the forcible evacuation of foreign nationals from their homes in favor of Germans or "Ethnic Germans"; and the persecution and extermination of Jews throughout Germany and German-occupied Europe.

The "RuSHA" trial was held before Military Tribunal I, composed of Lee B. Wyatt (Associate Justice of the Supreme Court of Georgia) presiding, Daniel T. O'Connell (of the Superior Court of Massachusetts), and Johnson T. Crawford.[140] The trial opened on 20 October 1947 and closed 19 February 1948.[141]

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137 Himmler himself was the "Commissioner," but Greifelt was the active chief of the organization.

138 All except the woman defendant (Inge Viermetz, a "civilian official" of Lebensborn) were SS officers ranking from major to "senior colonel" (*Oberfuehrer*).

139 Filed 1 July 1947. The defendants were charged with crimes against humanity in Count One of the indictment, and the same acts were charged as war crimes in Count Two. Count Three charged all the defendants except Viermetz with membership in the SS.

140 Technically this was the same tribunal that tried the "Medical Case," but Judge Crawford was the only hold-over.

141 James M. McHaney, Deputy Chief of Counsel, was in general charge of the prosecution, assisted by Knox Lamb of Greenwood, Mississippi, Harold E. Neeley of Huston, West Virginia, Daniel J. Shiller of Waterbury, Connecticut, and Edmund Schwenk of Washington, D.C.

In its judgment, rendered 10 March 1948, the Tribunal declared that the SS organizations headed by the defendants existed—

> for one primary purpose in effecting the ideology and program of Hitler, which may be summed up in one phrase: The two-fold objective of weakening and eventually destroying other nations while at the same time strengthening Germany, territorially and biologically, at the expense of conquered nations.[142]

The record of the "RuSHA Case" is a mine of information for ethnologists and students of the pernicious Nazi racial myths, which RuSHA and the other organizations endeavored to carry into practical effect. Indeed, the factual subject-matter of the case is perhaps more interesting than the legal issues or the judgment, which presents few, if any, remarkable features. Greifelt was sentenced to life imprisonment, Hofmann and Hildebrandt drew terms of twenty-five years, Lorenz twenty years, and four other defendants ten to fifteen years; these eight were convicted on all three counts of the indictment.[143] The woman defendant (Viermetz) was acquitted, and the other five were acquitted of the charges founded on crimes against humanity and war crimes, but convicted of membership in the SS "with knowledge of its criminal activities." These five, however, were immediately freed, on the basis that the time they had already spent in confinement pending trial was "sufficient punishment for the offense."[144] In view of their relatively high SS rank and the fact that hundreds of other SS members, many of lower rank, were still in German confinement awaiting trial before the *Spruchkammern,* this result seemed, to many, excessively lenient and out of harmony with the denazification program, as well as inconsistent with the sentences imposed for the same offense in the "Medical" and "Justice" cases.[145]

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142 Transcript, p. 5281.

143 Judge O'Connell, in a separate opinion, expressed the view that six of these sentences were too heavy, and that none should exceed twenty years.

144 The time so spent by these five defendants ranged from two years and eight months to two years and ten months.

145 Poppendick (in the "Medical Case") was sentenced to ten years' imprison-

By far the most interesting of the three SS cases was *United States* v. *Otto Ohlendorf et al* (Case No. 9), commonly known as the "Einsatzgruppen" Case. The Einsatzgruppen[146] were special units of the SS that accompanied the German Army during the invasion and occupation of the Soviet Union, with the general mission of ensuring "political security" in the occupied areas. As conceived and executed by the SS, this mission involved the immediate and outright slaughter of all Jews in the occupied areas, as well as of certain other specified categories, including Communist party functionaries and Gypsies. It was established that approximately one million Jews and others were "liquidated" in Russia by the Einsatzgruppen. The twenty-four defendants were commanders or subordinate officers of these units, and their trial was, not unnaturally, widely publicized as the "biggest murder trial in history."

The personnel of the Einsatzgruppen was drawn from several branches of the SS and police, including the "Gestapo" (Secret State Police), "Kripo" (Criminal Police), and the "Sicherheitsdienst" (Security Service). They were motorized, semi-military formations of 500 to 800 men each, divided into smaller units called "Einsatzkommandos" or "Sonderkommandos." Each of the four Einsatzgruppen (designated respectively A, B, C, and D) was attached to one of the three army group headquarters on the Eastern front (originally commanded by Field Marshals von Leeb, von Bock, and von Rundstedt), except Einsatzgruppe D, which was attached to the southernmost German army headquarters (the Eleventh Army, commanded successively by Generals von Schobert and von Manstein, which was part of von Rundstedt's army group). [147] Otto Ohlendorf, the principal defendant, was the commander of Einsatzgruppe D

ment on the membership charge alone, and Alstoetter (in the "Justice Case") drew five years on the same charge. Both held the rank of "senior colonel" (*Oberfuehrer*) in the SS.

[146] The term literally means "deployed group" or "committed group," but perhaps the most meaningful translation would be "task unit."

[147] The Eleventh Army invaded Russia from Rumania, and marched from the Rumanian frontier along the northern shore of the Black Sea to Rostov-on-Don.

and a major general in the SS.[148]

The general missions of the Einsatzgruppen were prescribed by Himmler through Reinhard Heydrich, Chief of the "Reichssicherheitshauptamt" (Main Reich Security Office) or "RSHA" (which comprised the police and intelligence branches of the SS). When engaged in the operational zone of the army, however, the Einsatzgruppen were subject to army command to the extent necessary from a military standpoint, and were dependent on the army for supply, transport, communications, etc. All this was regulated by an agreement entered into prior to the invasion of Russia by Heydrich and General Wagner, the German Army Quartermaster.

Upon the conclusion of the "Pohl Case," the "Einsatzgruppen Case" was commenced (29 September 1947) before the same court (Military Tribunal II); but two of the judges had departed, and Judge Musmanno now presided, with Judge Speight (the former alternate) and Richard D. Dixon (of the Superior Court of North Carolina)[149] as his associates. The direct case for the prosecution,[150] based entirely on captured documents, took only two days to present, but the defense consumed 136 trial days and the trial was not concluded until 13 February 1948.

Stark and simple as were the facts and issues, this was a profoundly significant as well as a highly dramatic trial. As the Tribunal declared, the facts—

> are so beyond the experience of normal man and the range of man-made phenomena that only the most complete judicial inquiry, and the most exhaustive trial, could verify and confirm them. Although the principle accusation is murder and, unhappily, man has been killing man ever since the days of Cain, the charge of purposeful homicide in this case reaches such fantastic proportions and surpasses

148 The other twenty-three defendants ranked from second lieutenant to brigadier general (of which there were five), and were commanders or officers of other Einsatzgruppen or the subordinate units, the Einsatzkommandos and Sonderkommandos.

149 Judge Dixon had previously sat as alternate judge of Tribunal IV, which was hearing the "Flick Case" (Case No. 5).

150 The Chief Prosecutor was Benjamin B. Ferencz, assisted by Arnost Horlik-Hochwald, Peter W. Walton, John E. Glancey, and James E. Heath.

such credible limits that believability must be bolstered with assurance a hundred times repeated.[151]

The defendants were not gangsters and thugs:

The defendants are not untutored aborigines incapable of appreciation of the finer values of life and living. Each man at the bar has had the benefit of considerable schooling. Eight are lawyers, one a university professor, another a dental physician, still another an expert on art. One, as an opera singer, gave concerts throughout Germany before he began his tour of Russia with the Einsatzkommandos. This group of educated and well-bred men does not even lack a former minister, self-unfrocked though he was.[152]

And if the mission of the Einsatzgruppen was murderous, its definition was naive and superstitious. All "Jews" were to be "eliminated," but—

No precise definition was furnished the Einsatz leaders as to those who fell within this fatal designation. Thus, when one of the Einsatzgruppen reached the Crimea, its leaders did not know what standards to apply in determining whether the Krimtschaks they found there should be killed or not. Very little was known of these people, except that they had migrated into the Crimea from a southern Mediterranean country, and it was noted they spoke the Turkish language. It was rumored, however, that somewhere along the arterial line which ran back into the dim past some Jewish blood had entered the strain of these strange Krimtschaks. If this were so, should they be regarded as Jews and should they be shot? An inquiry went off to Berlin. In due time the reply came back, that the Krimtschaks were Jews and should be shot. They were shot.

The Einsatszgruppen were, in addition, instructed to shoot Gypsies. No explanation was offered as to why these unoffending people, who through the centuries have contributed their share of music and song, were to be hunted down like wild game. Colorful in garb and habit, they have amused, diverted and baffled society with their wanderings, and occasionally annoyed with their indolence, but no one has condemned them as a mortal menace to organized society. That is, no one but National Socialism which, through Hitler, Himmler, and Heydrich ordered their liquidation. Accordingly, these simple, in-

151 Transcript, p. 6648.

152 *Ibid.*, p. 6769.

nocuous people were taken in trucks, perhaps in their own wagons, to the anti-tank ditches and there slaughtered with the Jews and the Krimtschaks.[153]

That the incredible massacres charged in the indictment had in fact occurred, the documentary proof left no doubt. The Tribunal quoted numerous reports of the Einsatzgruppen written at the time (mostly from June 1941 to the middle of 1942), containing such passages as the following:

A large-scale anti-Jewish action was carried out in the village of Lachoisk. In the course of this action 920 Jews were executed with the support of a kommando of the SS Division "Reich." The village may now be described as "free of Jews."

In Mogilew the Jews tried also to sabotage their removal into the Ghetto by migrating in masses. The Einsatzkommando No. 8, with the help of the Ordinary Police, blocked the roads leading out of the town and liquidated 113 Jews.

Two large-scale actions were carried out by the platoon in Krupka and Sholopanitsche, 912 Jews being liquidated in the former and 822 in the latter place.

In the city of Minsk, about 10,000 Jews were liquidated on 28 and 29 July, 6,500 of whom were Russian Jews—mainly old people, women and children—the remainder consisted of Jews unfit for work, most of whom had been sent to Minsk from Vienna, Bruenn, Bremen and Berlin in November of the previous year, at the Fuehrer's orders. The Sluzk area was also ridded of several thousand Jews. The same applies to Nowogrodek and Wilejka.[154]

Some of the defendants endeavored to deny personal participation in these murders; most leaned heavily on the defense of "superior orders." A few, like the defendant Ohlendorf (who freely admitted that his Einsatzgruppe D had killed some 90,000 Jews in the Ukraine and the Crimea), defended the killings on the ground of "military necessity," even to the slaughter of Jewish children:

I believe that it is very simple to explain if one starts from the fact

[153] *Ibid.*, pp. 6653-54.

[154] *Ibid.*, pp. 6659, 6672.

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that this order did not only try to achieve security but also a permanent security because for that reason the children were people who would grow up and surely, being the children of parents who had been killed, they would constitute a danger no smaller than that of the parents.[155]

Upon judgment (rendered 8 and 9 April 1948), the Tribunal sentenced Ohlendorf and thirteen other defendants to death by hanging. Two more received life sentences, and five prison terms of ten to twenty years.[156]

Two other prominent SS generals were convicted a year later in the "Ministries Case."[156a] Lieutenant General Gottlob Berger had headed the SS "Main Office" (*Hauptamt*), with general administrative authority over the Waffen SS, and was given full authority for all prisoner of war affairs during the last year of the war. Brigadier General Walter Schellenberg headed the foreign intelligence branch of the SS, and had personally staged the well-known "Venlo incident" which Hitler used as a pretext for the invasion of Holland shortly thereafter.[156b] Both were acquitted of crimes against peace, but were convicted of a variety of war crimes and crimes against humanity; Berger was sentenced to twenty-five and Schellenberg to six years.

Industrialists and Financiers

During the few years just prior to the outbreak of the second World War, the resurgence of Germany's military potential was astonishing and seemed almost miraculous in its rapidity. How had a nation, which had been thought so completely disarmed only a few years earlier, achieved such sudden and formidable

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155 *Ibid.*, p. 662.

156 One other defendant (Graf) was convicted only of membership in the SD, and was released on the basis that his imprisonment pending trial was a sufficient punishment in view of certain mitigating factors. One other defendant (Haussman) committed suicide after indictment but prior to trial, and one more (Rasch) was severed from the case during trial because of physical and mental disability (Parkinson's disease).

156a Described *infra*, pp. 330-35.

156b Two British agents, Stevens and Best, were kidnapped by Schellenberg on Dutch soil near the border town of Venlo.

strength? What were the relations between the Nazis and the Ruhr steelmasters and other German industrial leaders? What was their role in the Third Reich's slave labor and spoliation programs? Three of the trials were wholly, and one partially, concerned with the criminal responsibility of some forty-two leading German private business men, of whom about half were the directors and principal officers of the gigantic I.G. Farben chemicals combine, eighteen were the proprietors and officers of the Krupp and Flick steel and coal empires, and one was a leading commercial banker.

In the first of these cases (*United States* v. *Friedrich Flick*, Case No. 5), the powerful steel magnate and industrial promoter Friedrich Flick, with five of his principal associates, was brought to trial under a five-count indictment. In the first count, all six defendants were charged with having participated in the forcible deportation of many thousands of foreign nationals, concentration camp inmates, and prisoners of war, to forced labor under inhumane conditions in Germany and particularly in the Flick mines and factories. The second count accused all defendants but one of seizing plants and properties in France and the Soviet Union.

The first two counts, accordingly, were based primarily on the laws of war as embodied in the Hague Conventions, which require the occupying power to respect the lives and property of the inhabitants.[157] The third count, however, was brought under the definition of "crimes against humanity" in Law No. 10. Three of the defendants were charged with participating in the persecution of Jews *during the prewar years* (1936-39) by securing desirable Jewish industrial and mining properties, using as a lever the Nazi government's so-called "Aryanization" program. The fourth count charged Flick and his principal associate (Otto Steinbrinck) with knowing participation in persecutions and other atrocities committed by the SS, by giving large sums of money to the SS, and by consorting and consulting

[157] Hague Regulations (1907), Articles 46 *et seq.*

with Himmler, Pohl, Ohlendorf, Sievers, and other SS leaders in an association called the "Circle of Friends" (*Freundeskreis*) or "Himmler Circle" (*Himmlerkreis*), to which a select group of industrialists and SS officers belonged throughout the Nazi era.[158]

The "Flick Case" was the second trial of a private industrialist under the laws of war, and the first such trial to result in a final judgment.[159] The proceedings opened on 19 April 1947 and lasted more than six months.[160] The Honorable Charles B. Sears (retired Judge of the Court of Appeals of the State of New York) presided over Tribunal IV, which heard the case; his two associates were Frank N. Richman (former judge of the Supreme Court of Indiana) and William C. Christianson (former Justice of the Supreme Court of Minnesota.)[161] An unusually able and experienced group of defense counsel[162] served their clients well. Their principal points were that all business men in the Third Reich lived in fear of the Nazi tyranny and were obliged to utilize slave labor, and that the defendants' relations with Himmler and their ostensible agreement with Nazi racial ideas were self-protective maneuvers (described by Flick as "howling with the wolves") intended only to enable

158 The fifth count charged Steinbrinck alone with membership in the SS, in which he held the rank of brigadier general (*Brigadefuehrer*).

159 After the first World War, the prominent Saar industrialists Hermann and Robert Roechling and several associates were tried before a French military tribunal, charged with the war-time plunder of French property, in violation of the laws of war. The tribunal convicted the defendants and imposed sentences of up to ten years' imprisonment, but on appeal the judgment was annulled for purely technical reasons, and thereafter the proceedings were never renewed. Interestingly enough, Hermann Roechling was tried and convicted again as a war criminal after the second World War, as described hereinafter.

160 The prosecution was headed by Thomas E. Ervin, Deputy Chief of Counsel (of New York City), whose leading associate was Charles S. Lyon (also of New York City).

161 Richard D. Dixon (of the Superior Court of North Carolina) sat as alternate member for part of the trial, but became a member of Military Tribunal II for the trial of the "Einsatzgruppen Case" prior to the conclusion of the Flick trial.

162 Flick's counsel was Dr. Rudolf Dix, who had defended Schacht before the IMT; other counsel included Drs. Otto Kranzbuehler, Hans Flaechsner, and Walter Siemers, who had represented respectively Doenitz, Speer, and Raeder before the IMT.

them to maintain their positions. Most important, however, was the theme, first clearly heard in the defense's closing arguments in the "Flick Case," which was to become increasingly dominant at Nuremberg: that German behavior during the second World War was no more blameworthy than that of the Allied nations; that slave labor and economic plunder were certainly no more criminal than the Allied bombing of German cities; and that German excesses (such as the atrocities against Jews) could be matched by excesses on the Allied side (citing the bombing of Dresden in the last few days of the war).

The judgment, rendered 22 December 1947, was exceedingly (if not excessively) moderate and conciliatory. The Tribunal accepted the defendants' testimony that they "were not desirous of employing foreign labor,"[163] and held as a matter of law that the defense of "necessity" was legally sufficient to meet the bulk of the prosecution's "slave labor" charges in the first count of the indictment:

> This Tribunal might be reproached for wreaking vengeance rather than administering justice if it were to declare as unavailable to defendants the defense of necessity here urged in their behalf. This principle has had wide acceptance in American and English Courts and is recognized elsewhere. . . .
>
> The evidence . . . in our opinion . . . clearly established that there was in the instant case "clear and present danger" within the contemplation of that phrase. We have already discussed the Reich reign of terror. The defendants lived within the Reich. The Reich, through its hordes of enforcement officials and secret police, was always "present," ready to go into instant action and to mete out savage and immediate punishment against anyone doing anything that could be construed as obstructing or hindering the carrying out of governmental regulations or decrees.[164]

However, two of the defendants—Flick himself and his associate Weiss—were found to have taken the initiative in order to procure a large manufacturing quota for a particular Flick

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163 Transcript, p. 10988.

164 *Ibid.*, pp. 10992, 10993-4.

freight-car manufacturing plant, and an allocation of Russian prisoners to work in the plant. These "active steps" were held to "deprive the defendants Flick and Weiss of the complete defense of necessity" because "they were not taken as a result of compulsion or fear, but admittedly for the purpose of keeping the plant as near capacity production as possible"; accordingly, these two were convicted under the indictment's first count.[165]

Flick alone was convicted of economic plunder under the second count; his three associates charged with this offense were acquitted as "salaried employees" who gave Flick "information and advice" but made no "decision," and therefore the Tribunal could not "see in their conduct any culpability for which they should now be punished."[166] Flick's conviction was based on his endeavor to obtain permanent ownership of a large steel plant in Lorraine. However, according to the court, Flick's "acts were not within his knowledge intended to contribute to a program of 'systematic plunder' conceived by the Hitler regime and for which many of the major war criminals have been punished. If they added anything to this program of spoliation, it was in a very small degree."[167]

The prosecution's effort, under the indictment's third count, to convict three of the defendants of crimes against humanity committed before the war, was totally unsuccessful. The court refused to take jurisdiction, on the ground that "crimes committed before and wholly unconnected with the war" were not encompassed by Law No. 10.[168] It added, furthermore, that crimes against humanity are "only such as affect the life and liberty of the oppressed peoples," and that "compulsory taking of industrial property, however reprehensible, is not in that category." Consequently, had it assumed jurisdiction of the charge, the Tribunal would have been unwilling to decide[169]

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165 *Ibid.*, pp. 10989, 10995.

166 *Ibid.*, p. 11004.

167 *Ibid.*, p. 11003.

168 *Ibid.*, p. 11010.

169 *Ibid.*, p. 11013.

"that a person becomes guilty of a crime against humanity merely by exerting anti-semitic pressure to procure by purchase or through state expropriation industrial property owned by Jews."

Both Flick and Steinbrinck were convicted under the fourth count as accessories to the crimes of the SS.[170] Their financial contributions and associations with the SS were clearly proved, and the court concluded that both defendants knew enough of the organization's criminal activities to render them guilty. Nevertheless, according to the Tribunal "there is considerable to be said in mitigation": "fear of reprisals," "premium to insure personal safety in the fearful days of the Third Reich," Himmler's "dual personality" and "cultural interests," which enabled him to play "the gentleman and genial host"; Steinbrinck's intercessions with Himmler on behalf of Niemoller and his respected status as "a U-boat commander who risked his life and those of his crew to save survivors of a ship which he had sunk," which made it "unthinkable" that Steinbrinck "would willingly be a party to the slaughter of thousands of defenseless persons"[171]—these were factors mentioned by the Tribunal which played a part in fixing the sentences of the convicted defendants. Flick was sentenced to seven, Steinbrinck to five, and Weiss to two and a half years' imprisonment, all three with credit for time already served awaiting and during trial.[172]

The other Nuremberg trial involving Ruhr heavy industry was the "Krupp Case" (*United States* v. *Alfried Krupp von Bohlen und Halbach,* Case No. 10). Dr. Gustav von Bohlen und Halbach, upon whom Emperor Wilhelm II had conferred the privilege of using the Krupp name when he married Bertha Krupp in 1906, had been the active head of the Krupp enterprises from

170 Steinbrinck was also convicted of membership in the SS under Count Five.

171 Transcript, pp. 11014-23.

172 After confirmation of the sentences by General Clay, the defendants (through American counsel) filed suit in the District Court for the District of Columbia seeking a writ of habeas corpus, on the ground that the proceedings and judgment were null and void. The petition was denied by the District Court, but an appeal from the denial is still pending in the Court of Appeals for the District of Columbia.

that time until the second World War. Gustav Krupp survived the war and was indicted before the IMT, but his health had failed early in the war, and by its end he was a complete mental and physical wreck, quite incapable of standing trial. His forty-year-old son Alfried had been in active charge of the Krupp enterprises for several years, and had been vested with sole ownership and control by a special Reich decree of 12 November 1943, called the "Lex Krupp."

Alfried Krupp was indicted with eleven other officials of the firm, including such well-known Krupp associates as Ewald Loeser, Eduard Houdremont, and Erich Mueller. The charges pertaining to forced labor and economic plunder paralleled, in general, the comparable charges in the "Flick Case."[173] In addition, the Krupp defendants were charged (Count One) with committing crimes against peace by planning and waging aggressive wars and (Count Four) with conspiracy to commit such crimes against peace. The indictment specified that the Krupp firm took the lead in secret and illegal rearmament activities under the Weimar Republic, supported Hitler's seizure of power, helped to reorganize German industry along Nazi lines, cooperated knowingly and willingly in the rearmament of Germany for foreign conquest, and "as an integral part of the waging of war" had "plundered and exploited . . . property and resources of occupied countries and enslaved their citizens."

The trial lasted from early December 1947 to the end of June 1948.[174] The court (Military Tribunal III, but with entirely new membership) was composed of Hu C. Anderson (of the Court of Appeals of Tennessee) presiding, Edward J. Daly (of the Superior Court of Connecticut), and William J. Wilkins (of the Superior Court of Washington).

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[173] The "Krupp Case" contained no charges involving "Aryanization" or the SS, such as had been embodied in the third, fourth, and fifth counts of the Flick indictment.

[174] During the early stages, the prosecution was headed by Joseph W. Kaufman, Deputy Chief Counsel, of New York City. In January 1948, Mr. Kaufman was called back to the United States, and his place was taken by Rawlings Ragland, Deputy Chief Counsel, of Lexington, Kentucky. Principal associate counsel included H. Russell Thayer, Cecilia Goetz, and Max Mandellaub.

The Krupp proceedings were somewhat more explosive than was customary at Nuremberg. At one point all defense counsel present in court rose and quit the chamber in a body, in protest against the Tribunal's declining to hear further argument on a procedural point which had already been ruled on. After awaiting their return for several hours in vain, the Tribunal instructed the marshal to round them up, and committed the demonstrators to temporary confinement for contempt of court. Upon their release the next day, one of the assistant counsel refused to apologize or otherwise purge himself of contempt and was barred from further participation in the case. Throughout the trial, defense counsel and defendants adopted an unusually intransigent attitude, and none of the defendants took the stand in his own defense.

After the prosecution had rested its case in chief, the defense moved for a judgment of not guilty under the first and fourth counts, relating to aggressive war. A few weeks later the Tribunal granted the motion, and acquitted all the defendants of these charges; the trial thereafter proceeded under the spoliation and slave labor counts only. The opinion of the full Tribunal acquitting the defendants is rather sketchy but, from the apparent reliance on the IMT's acquittals of Schacht and Speer, one may infer that the defendants were not shown to have had sufficient knowledge of Hitler's warlike intentions to justify, in the eyes of the court, a finding of guilt. Separate opinions by Judges Anderson and Wilkins spelled out their individual views much more clearly. The former thought that criminal liability for the planning or waging of aggressive war must be restricted to "leaders and policy-makers," and could not be extended to "private citizens who participate . . . in the war effort" but who have "no voice or control in the conduct of the war or its initiation." Judge Wilkins' approach was quite different. A large part of the evidence with respect to conspiracy and to the planning of aggressive war had most directly implicated Gustav Krupp, and there can be little doubt that the prosecution's case against the defendants suffered by comparison with what their

case against Gustav might have been had he been in the dock. As Judge Wilkins put it:

> . . . the voluminous amount of credible evidence presented by the Prosecution, the major part of which comes from the files of the Krupp firm, is so convincing and so compelling that I must state that the Prosecution built up a strong prima facie case, as far as the implication of Gustav Krupp and the Krupp firm is concerned. . . .
>
> Giving the defendants the benefit of what may be called a very slight doubt, and although the evidence with respect to some of them was extraordinarily strong, I concurred that, in view of Gustav Krupp's overriding authority in the Krupp enterprises, the extent of the actual influence of the present defendants was not as substantial as to warrant finding them guilty of Crimes Against Peace.[175]

The Tribunal's judgment under the second and third counts of the indictment was rendered on 31 July 1948. Of ten accused under Count Two (spoliation), six were convicted and four acquitted. All the defendants had been charged under Count Three (forced labor) and all but one were found guilty.[176] The convictions under Count Two were based entirely on Krupp expropriations and other activities in western Europe—principally France and Holland. Charges in the indictment with respect to economic plunder in Austria were dismissed for lack of jurisdiction,[177] and charges of similar offenses in Yugoslavia, Greece, and the Soviet Union were passed over in silence. In a dissenting opinion, Judge Wilkins took the view that the laws of war apply to "intervention, invasions, and aggressions" even "when there is no state of war," and that the defendants Krupp and Loeser should have been convicted of spoliation in Austria.[178] He further declared that Krupp and several other defendants should, in his opinion, be found guilty of committing this offense in Yugoslavia and the Soviet Union.

The Tribunal's opinion under Count Three, read by Judge Anderson, was unanimous and very strong. The Krupp firm

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175 Transcript, pp. 13435, 13436-37.

176 Thus only one defendant—Karl Pfirsch—was acquitted on all counts.

177 Transcript, p. 13293.

178 Transcript, p. 13408.

and the convicted defendants were found guilty of constant, wide-spread, and flagrant violations of the laws of war relating to the employment of prisoners of war, eager participation in the forced labor procurement program, and shocking mistreatment of the prisoners, deportees, and concentration camp inmates who toiled in the Krupp plants. The defense of "necessity" was unqualifiedly rejected in a powerfully reasoned analysis of the evidence; the defendants "were not acting under compulsion or coercion exercised by the Reich authorities within the meaning of the law of necessity" because their will was not "overpowered" but indeed coincided "with the will of those from whom the alleged compulsion emanates."[179] Furthermore, even assuming an element of coercion, the injuries inflicted by the defendants were far greater than the evil which threatened them:

> . . . the question from the standpoint of the individual defendants resolves itself into this proposition: To avoid losing my job or the control of my property, I am warranted in employing thousands of civilian deportees, prisoners of war, and concentration camp inmates, keeping them in a state of involuntary servitude; exposing them daily to death or great bodily harm, under conditions which did in fact result in the deaths of many of them; and working them in an undernourished condition in the production of armament intended for use against the people who would liberate them and indeed even against the people of their homelands.

If we may assume that as a result of opposition to Reich policies, Krupp would have lost control of his plant and the officials their positions, it is difficult to conclude that the law of necessity justified a choice favorable to themselves and against the unfortunate victims who had no choice at all in the matter. Or, in the language of the rule, that the remedy was not disproportioned to the evil. In this connection it should be pointed out that there is a very respectable authority for the view that the fear of the loss of property will not make the defense of duress available.

But the extreme possibility hinted at was that Gustav Krupp and his officials would not only have lost control of the plant but would have

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179 Transcript, p. 13387.

been put in a concentration camp had they refused to adopt the illegal measures necessary to meet the production quotas.

. . . in all fairness it must be said that in any view of the evidence the defendants, in a concentration camp, would not have been in a worse plight than the thousands of helpless victims whom they daily exposed to danger of death and great bodily harm from starvation and the relentless air raids upon the armament plants to say nothing of involuntary servitude and the other indignities which they suffered. The disparity in the number of the actual and potential victims is also thought provoking.[180]

When it came to the imposition of sentences, the Tribunal split again. They were pronounced by Judges Wilkins and Daly, who were in agreement. Ten of the convicted defendants received prison terms ranging from six to twelve years with credit for past confinement before and during trial; the eleventh (Kupke) was sentenced only to the period of his past confinement (just under three years), and was released forthwith. Alfried Krupp not only received (together with Mueller and von Buelow) a twelve-year sentence, but was deprived of all his property by forfeiture. This penalty was specifically authorized by Control Council Law No. 10,[181] which further provided that "any property declared to be forfeited . . . shall be delivered to the Control Council for Germany, which shall decide on its disposal."[182] Judge Anderson concurred only in the prison sentences for Krupp and Kupke. The others he thought too severe because of "circumstances in mitigation not mentioned in the judgment"; Loeser, in particular, he thought should be released because his connection "with the underground to overthrow Hitler and the Nazi regime" had, the Judge thought, been convincingly established.[183] Judge Anderson also dissented from the order forfeiting Alfried Krupp's property.[184]

180 Transcript, pp. 13396-97.

181 Article II, sec. 3.

182 A war crimes tribunal in the French zone of occupation has imposed a similar forfeiture under Law No. 10 against the Saar industrialist Hermann Roechling. See *infra*, p. 339.

183 Transcript, pp. 13451-52.

184 What Alfried Krupp's property amounted to was not determined by the

Biggest and most complicated of the industrialist cases was the trial of twenty-four directors and officers of the I.G. Farbenindustrie A.G.,[185] commonly known as the "Farben Case" (*United States* v. *Carl Krauch et al.,* Case No. 6). This enormous chemicals and synthetics combine kept the German war machine rolling in the first World War, when the imports of Chilean nitrates used in the manufacture of explosives were cut off, by developing the famous Haber-Bosch nitrogen fixation process for the production of synthetic nitrates, as well as the German poison gases. Farben's role in German rearmament under Hitler was even more important; German deficiencies in oil and natural rubber were made up by Farben processes and factories for the manufacture of the synthetic gasoline and rubber so vital to mechanized and aerial warfare.

Twenty of the defendants named in the indictment were the members of Farben's governing body, the "Vorstand," and the other four were important officers of the corporation.[186] The leading figures in the dock were Hermann Schmitz (Chairman of the Vorstand), Georg von Schnitzler and Fritz Ter Meer (Chairmen of the Commercial and Technical Committees, respectively), and Carl Krauch (Chairman of the "Aufsichtsrat," or Supervisory Board), who joined Goering's staff in the office of the Four Year Plan upon its establishment in 1936, and speedily became Goering's principal technical and scientific adviser (if not more). All of the defendants were indicted for the same offenses charged in the "Krupp Case"—planning and waging aggressive war (Count One), conspiracy to that end (Count Five), spoliation (Count Two), and enslavement and mistreatment of prisoners of war, deportees, and concentration

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order. Under the Hitler decree of 12 November 1943 he was the sole owner of the Krupp enterprises, and his mother, Bertha Krupp, made over all the Krupp properties to Alfried at that time. It is not impossible, however, that the Krupp family may now take the position that Bertha is the true owner, in an effort to keep the properties in the family.

185 The name literally means "community of interest of the dye-stuffs industry, incorporated."

186 One member of the Vorstand (Brueggeman) was severed from the case for reasons of health, so only twenty-three defendants stood trial.

camp inmates (Count Three).[187] The case was heard by Military Tribunal VI, and the trial lasted from August 1947 to June 1948.[188] Curtis G. Shake (former Justice of the Indiana Supreme Court) presided, with James Morris (Judge of the North Dakota Supreme Court) and Paul M. Hebert (Dean of the Louisiana State University Law School) as the other members and Clarence F. Merrell (of the Indiana Bar) as the alternate member.

In the prosecution's mind, the evidence against the Farben defendants was the strongest of all the industrialist trials. This was particularly true of the "aggressive war" charges; the prosecution believed its evidence established that (*a*) the leaders of Farben, long before the coming of Hitler, wanted a dictatorship which could "act without concern for the caprices of the masses"; (*b*) they wished to achieve domination over the chemical industry of all Europe, and beyond Europe if possible; (*c*) even before Hitler seized power, Farben had concluded arrangements with him for government support for their synthetic-gasoline plant expansion program; (*d*) Farben assisted Hitler's seizure and consolidation of power by extensive financal contributions and by systematic propaganda; (*e*) Farben embarked upon the closest collaboration with Hitler and with the German military leaders, and participated eagerly in planning the re-establishment of a gigantic German army and air force; (*f*) in the struggle between Schacht (who feared that unrestrained rearmament would jeopardize Germany's financial stability) and Goering (the protagonist of rearmament irrespective of financial considerations), Farben threw its weight completely behind Goering; (*g*) the principal Farben defendant, Carl Krauch, was Goering's immediate advisor and chief administrator in the

[187] In addition, three defendants were charged (Count Four) with membership in the SS.

[188] Josiah E. DuBois, Jr., Deputy Chief Counsel (of Camden, New Jersey) headed the prosecution staff, and his principal associate was Drexel A. Sprecher (of Washington, D. C.). Others who took a prominent part were Morris Amchan (Washington, D. C.), Jan Charmatz (Puerto Rico), Belle Mayer and Emmanuel Minskoff (Washington, D. C.), Randolph Newman (New York City), and Virgil Van Street (Baltimore, Maryland).

chemical field; (*h*) Goering's Four Year Plan—the planned basis of Germany's armament for war—was seventy-five per cent a Farben project; (*i*) because of Farben's strategic position in the rearmament picture, particularly for rubber, gasoline, ammunition, and poison gas, the Farben leaders knew perfectly well that the rearmament was far surpassing any conceivable defensive needs; (*j*) Farben developed its own plans for the absorption of the chemical industries in the countries to be overrun by Germany, contemporarily with the military plans, and put them into execution immediately after each conquest had been completed; and (*k*) Farben's advice and consultation with the military and political leaders far transcended mere technical matters, and was aggressive and warlike in the extreme. In April 1939, for example, the defendant Carl Krauch submitted a report to Goering in which he counselled:

> It is essential for Germany to strengthen its own war potential as well as that of its allies to such an extent that the coalition is equal to the efforts of practically the rest of the world. This can be achieved only by new, strong and combined efforts by all of the allies, and by expanding and improving the greater economic domain corresponding to the improved raw material basis of the coalition, peaceably at first, to the Balkans and Spain.
>
> If action does not follow upon these thoughts with the greatest possible speed, all sacrifices of blood in the next war will not spare us the bitter end which once before we have brought upon ourselves owing to lack of foresight and fixed purposes.[189]

Whatever the impact of this evidence may be on the writing of history, it made little impression on two of the judges. The Tribunal's judgment, handed down at the end of July 1948, acquitted all defendants of conspiracy, planning, or preparing to wage, and of waging, aggressive war; all were adjudged not guilty under Counts One and Five. Krauch "did not participate in the planning of aggressive wars." The evidence of his knowledge of Hitler's aggressive intentions "degenerates from proof to mere conjecture."[190] The Krauch memorandum, quoted

[189] Transcript, p. 144.

[190] Transcript, pp. 15685, 15689.

above, merely showed[191] "that Krauch was recommending plans for the strengthening of Germany which, to his mind, was being encircled and threatened by strong foreign powers, and that this situation might and probably would at some time result in war. But it falls far short of being evidence of his knowledge of the existence of a plan on the part of the leaders of the German Reich to start an aggressive war against either a definite or a probable enemy." The evidence as to the other defendants was even weaker. As to the charge of "waging":

> . . . Some reasonable standard must . . . be found by which to measure the degree of participation necessary to constitute a crime against peace in the waging of aggressive war. The IMT fixed that standard of participation high among those who lead their country into war.
>
> The defendants now before us were neither high public officials in the civil government nor high military officers. Their participation was that of followers and not leaders. If we lower the standard of participation to include them, it is difficult to find a logical place to draw the line between the guilty and the innocent among the great mass of German people. It is, of course, unthinkable that the majority of Germans should be condemned as guilty of committing crimes against peace. This would amount to a determination of collective guilt. . . .[192]

Judge Hebert concurred in the acquittals, but filed a separate opinion of wholly different hue. The majority, he thought, "misread the record in the direction of a too complete exoneration and an exculpation even of moral guilt to a degree which I consider unwarranted. The record of I.G. Farbenindustrie, A.G. . . . has been shown to have been an ugly record which went, in its sympathy and identity with the Nazi regime, far beyond the activities of . . . normal business." But Judge Hebert concurred in the result, because—

> . . . I feel the necessity for bowing to such weighty precedents as the acquittal by the International Military Tribunal of Schacht and Speer of the charges of Crimes against Peace; of the acquittal

[191] Transcript, pp. 15692-93.

[192] Transcript, pp. 15706-7.

by Military Tribunal III of the leading officials of the Krupp firm on similar charges; and, the more recent precedent established by an international military tribunal in the French occupied zone in acquitting officials of the Roechling concern of the charge of participation in the planning and a preparation of aggressive war. Such precedents, coupled with a most liberal application of the rule of "reasonable doubt" in favor of the defendants and added to a reluctance, because of the novelty of the Crime against Peace, to draw inferences unfavorable to a defendant in the all-important area of knowledge of the aim of aggressive war and specific intent to further such aim lead to the result of acquittal. I am concurring though realizing that on the vast volume of credible evidence presented to the Tribunal, if the issues here involved were truly questions of first impression, a contrary result might as easily be reached by other triers of the facts more inclined to draw inferences of the character usually warranted in ordinary criminal cases. I do not agree with the majority's conclusion that the evidence presented in this case falls so far short of sufficiency as the Tribunal's opinion would seem to indicate. The issues of fact are truly so close as to cause genuine concern as to whether or not justice has actually been done because of the enormous and indispensable role these defendants were shown to have played in the building of the war machine which made Hitler's aggressions possible.[192a]

Nor was the Tribunal any more of one mind in the field of slave labor. The judgment allowed the defendants the benefit of the defense of "necessity" even more liberally than had the "Flick Case." Only in connection with Farben's activities at Auschwitz—where a synthetic rubber plant was constructed adjacent to the notorious concentration camp with the specific intention of utilizing concentration camp labor—did the Tribunal find such evidence of Farben's "initiative" as to strip some of the defendants of the protective mantle. The area of criminal responsibility, however, was very narrow. Three defendants—Ambros, Buetefisch, and Duerrfeld—had shared "direct responsibility" for planning and executing the Farben. Auschwitz project. Krauch had utilized his official position to help Farben obtain labor from the concentration camp. Ter Meer was Ambros' immediate superior, and had visited Auschwitz a number of times

[192a] Concurring Opinion by Paul M. Hebert, pp. 2-3.

and discussed the allocation of inmates to Farben with the infamous Rudolf Hoess, the commandant of Auschwitz concentration camp.[193] Only these five were found guilty under Count Three; all the other defendants, held to be less immediately concerned, were acquitted. From this conclusion Judge Hebert dissented. The fifteen other members of the Farben "Vorstand" should also have been found guilty, he thought; likewise, the defense of necessity was not available to the defendants:

> Under the evidence it is clear that the defendants in utilizing slave labor which is conceded to be a war crime (in the case of non-German nationals) and a crime against humanity, did not, as they assert, in fact, act exclusively because of the compulsion and coercion of the existing Governmental regulations and policies. The record does not establish by any substantial credible proof that any of the defendants were actually opposed to the Governmental solution of the manpower problems reflected in these regulations. On the contrary, the record shows that Farben willingly cooperated and gladly utilized each new source of manpower as it developed. Disregard of basic human rights did not deter these defendants. . . .
>
> Willing cooperation with the slave labor utilization of the Third Reich was a matter of corporate policy that permeated the whole Farben organization. The Vorstand was responsible for the policy. For this reason, criminal responsibility goes beyond the actual immediate participants at Auschwitz. It includes other Farben Vorstand plant-managers and embraces all who knowingly participated in the shaping of the corporate policy. I find on the evidence that all Vorstand members must share the responsibility for the approval of the policy despite the fact that there were varying degrees of immediate connection among various defendants.[194]

Only in that part of the judgment relating to Count Two (spoliation) was the court unanimous. Charges relating to Austria and the Sudetenland were dismissed on the theory that no state of war had existed and therefore the laws of war were

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[193] Since tried, convicted, and executed by a Polish war crimes tribunal, as responsible for the extermination of millions of Jews in the Auschwitz gas chambers.

[194] Dissenting Opinion by Paul M. Hebert, pp. 4, 9-10.

inapplicable. The accusations relating to the Soviet Union were rejected because Farben plans for the expropriation of Soviet properties never were consummated. But Farben's activities in Poland, Norway, and France were held to have constituted plunder, in violation of the laws of war. Nine of the defendants, including Schmitz, von Schnitzler, and Ter Meer, were convicted, and fourteen were acquitted, under this count.

Of the twenty-three defendants, accordingly, thirteen were convicted either of spoliation or slave labor offenses (including Ter Meer, who alone was convicted of both), and ten were acquitted of all charges. The defendants convicted for the Auschwitz project received the heaviest of the very light sentences: eight years for Ambros and Duerrfeld, seven for Ter Meer, and six for Krauch and Buetefisch. Von Schnitzler was sentenced to five years and Schmitz to four; the other six convicted defendants received only eighteen-month to three-year terms. All received credit for past confinement, which meant that two convicted defendants (Ilgner and Kugler) were immediately released, and that five others (Schmitz, Oster, Buergin, Haefliger, and Jaehne) had less than one year more to serve.

The prominent financier, Karl Rasche, Chairman of the "Vorstand" of the enormous Dresdner Bank, was tried in the "Ministries Case."[195] Rasche was not accused of warmaking, but of economic plunder in the occupied countries, slave labor, and membership in the same "Circle of Friends of Himmler" to which Flick had belonged,[196] as well as in the SS.[197] The charges relating to slave labor were rejected, in part upon the basis of legal theory relating to bankers' responsibilities:

> The real question is, is it a crime to make a loan, knowing or having good reason to believe that the borrower will use the funds in financing enterprises which are employed in using labor in violation of either national or international law? . . . A bank sells money or credit in the same manner as the merchandiser of any other com-

195 *Infra*, pp. 330-35.

196 *Supra*, pp. 303-4.

197 With the rank of lieutenant colonel.

modity. It does not become a partner in enterprise. . . . Loans or sale of commodities to be used in an unlawful enterprise may well be condemned from a moral standpoint and reflect no credit on the part of the lender or seller in either case, but the transaction can hardly be said to be a crime. Our duty is to try and punish those guilty of violating international law, and we are not prepared to state that such loans constitute a violation of that law. . . .[198]

But the charges relating to spoliation were upheld. Rasche had participated actively, through his position and activities in the Dresdner Bank, not only in the confiscation of Czech banks and industries, but also in "the Reich's indefensible program of Aryanization" in Czechoslovakia and Holland. He was also convicted of membership in the SS, and was sentenced to seven years.

Field Marshals and Generals

Two of the Nuremberg indictments contained charges against twenty-five high-ranking German military leaders.[199] These included one admiral and one air force field marshal, both of whom were acquitted.[200] The other defendants were all field marshals or generals in the German Army, and one of the cases was exclusively and the other predominantly concerned with army matters.

In the so-called "Hostage Case" (*United States* v. *List et al.*, Case No. 7), twelve army leaders were indicted for war crimes committed during the German occupation of Yugoslavia, Albania, and Greece. The principal defendant, Field Marshal Wilhelm List, was one of the most senior officers of the German Army. He had commanded the Twelfth Army, which carried out the invasion and occupation of Greece and Yugoslavia in April 1941, and had stayed on as commander of all German troops in those countries until October 1941, when he fell ill

198 Judgment, pp. 485-86.

199 Erhard Milch, Field Marshal of the Luftwaffe, was tried in still another case, but the charges were of quite a different type, not pertaining directly to military affairs, as described *infra*, pp. 329-30.

200 Admiral Schniewind and Field Marshal Sperrle.

and was succeeded by Lt. General[201] Wilhelm Kuntze, another defendant. Two of the accused did not stand trial: Field Marshal Maximilian von Weichs, the supreme commander in that area during the last two years of the war, became increasingly ill during the trial and was separated from the case prior to judgment; Lt. General Franz Boehme, Commanding General in Serbia in 1941, committed suicide in Nuremberg jail prior to his arraignment. The ten who stood trial included (in addition to List and Kuntze) General Lothar Rendulic, who commanded the Second Panzer Army in Yugoslavia in 1943 and 1944; Lt. General Hermann Foertsch, who was chief of staff to List, Kuntze, and von Weichs; five other lieutenant generals who were corps or subordinate occupational commanders; and one brigadier general in a subordinate staff position.

The basic charge against all the defendants was responsibility for the unwarranted slaying of many thousands of Yugoslav and Greek civilians. Many were killed pursuant to an order, originally promulgated by von Weichs, directing the execution of one hundred civilian "hostages" for every German soldier killed by the partisans. On other occasions, all the inhabitants of particular villages, near which partisan action had occurred, were slaughtered and the villages burned. There were other charges: General Rendulic, for example, was indicted for wanton devastation of the northern Norwegian province of Finnmark during the winter of 1944-45, when he led the German retreat from Finland; and several of the defendants who had served on the Russian front were charged with killing uniformed prisoners of war pursuant to the notorious German "Commissar Order."[202]

The proceedings lasted from July 1947 to February 1948, when judgment was rendered.[203] Charles F. Wennerstrum (Justice of

[201] Throughout, German "field marshals" (equivalent to an American five-star General of the Army) are referred to as such, but other German generals are referred to by American equivalent ranks, i.e., a *"generaloberst"* as a (four-star) general, a *"general"* as a (three-star) lieutenant general, a *"generalleutnant"* as a (two-star) major general, and a *"generalmajor"* as a (one-star) brigadier general.

[202] See *infra*, p. 328.

[203] The chief prosecutor during the opening stages was Clark Denney of

the Iowa Supreme Court) presided, with Edward F. Carter (Judge of the Supreme Court of Nebraska) and George J. Burke (of the Michigan bar, former General Counsel of the Office of Price Administration) as the other members.

The judgment was noteworthy alike for its excellent workmanship and its conservatism. Two of the most hotly debated issues in the case were whether "partisans" or "guerrillas" are entitled to the rights of belligerents and to be treated as prisoners of war when captured, and whether it is ever lawful for an occupying power to execute hostages taken from the civilian population. As to the first question, the Tribunal declared—

> Just as the spy may act lawfully for his country and at the same time be a war criminal to the enemy, so guerrillas may render great service to their country and, in the event of success, become heroes even, still they remain war criminals in the eyes of the enemy and may be treated as such. In no other way can an army guard and protect itself from the gadfly tactics of such armed resistance. And, on the other hand, members of such resistance forces must accept the increased risks involved in this mode of fighting. Such forces are technically not lawful belligerents and are not entitled to protection as prisoners of war when captured. . . .
>
> We think the rule is established that a civilian who aids, abets or participates in the fighting is liable to punishment as a war criminal under the laws of war. Fighting is legitimate only for the combatant personnel of a country. It is only this group that is entitled to treatment as prisoners of war and incurs no liability beyond detention after capture or surrender.[204]

and determined, on the record before it, that—

> There is convincing evidence in the record that certain band units in both Yugoslavia and Greece complied with the requirements of international law entitling them to the status of a lawful belligerent. But the greater portion of the partisan bands failed to comply with the rules of war entitling them to be accorded the rights of a lawful

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New York City. When Mr. Denney became ill, his chief associate, Theodore F. Fenstermacher (also of New York City), took charge. Walter H. Rapp of San Francisco and Baucom Fulkerson of Little Rock, Arkansas, also took a leading part in the prosecution.

[204] Transcript, pp. 10441, 10442.

belligerent. The evidence fails to establish beyond a reasonable doubt that the incidents involved in the present case concern partisan troops having the status of lawful belligerents.[205]

Turning to the question of "hostages" taken from the civilian population, and subsequently executed in reprisal for acts of violence against the occupying army, the court wrote:

The idea that an innocent person may be killed for the criminal act of another is abhorrent to every natural law. We condemn the injustice of any such rule as a barbarous relic of ancient times. But it is not our province to write international law as we would have it,—we must apply it as we find it.

An examination of the available evidence on the subject convinces us that hostages may be taken in order to guarantee the peaceful conduct of the populations of occupied territories and, when certain conditions exist and the necessary preliminaries have been taken, they may, as a last resort, be shot. The taking of hostages is based fundamentally on a theory of collective responsibility. . . . The occupant may properly insist upon compliance with regulations necessary to the security of the occupying forces and for the maintenance of law and order. In the accomplishment of this objective, the occupant may, only as a last resort, take and execute hostages.[206]

However, this right was hedged about with numerous qualifications:

. . . there must be some connection between the population from whom the hostages are taken and the crime committed. If the act was committed by isolated persons or bands from distant localities without the knowledge or approval of the population or public authorities, and which, therefore, neither the authorities nor the population could have prevented, the basis for the taking of hostages, or the shooting of hostages already taken, does not exist.

It is essential to a lawful taking of hostages under customary law that proclamation be made, giving the names and addresses of hostages taken, notifying the population that upon the recurrence of stated acts of war treason the hostages will be shot. The number of hostages shot must not exceed in severity the offenses the shooting is

205 Transcript, p. 10439.

206 *Ibid.*, p. 10446.

designed to deter. Unless the foregoing requirements are met, the shooting of hostages is in contravention of international law and is a war crime in itself.[207]

And these restrictions the Germans had consistently overlooked:

The evidence in this case recites a record of killing and destruction seldom exceeded in modern history. Thousands of innocent inhabitants lost their lives by means of a firing squad or hangman's noose,—people who had the same inherent desire to live as do these defendants. . . . Mass shootings of the innocent population, deportations for slave labor and the indiscriminate destruction of public and private property, not only in Yugoslavia and Greece but in many other countries as well, lend credit to the assertion that terrorism and intimidation was the accepted solution to any and all opposition to the German will. It is clear, also, that this had become a general practice and a major weapon of warfare by the German Wehrmacht. . . .

That the acts charged as crimes in the indictment occurred is amply established by the evidence. In fact it is evident that they constitute only a portion of the large number of such acts which took place as a part of a general plan for subduing the countries of Yugoslavia and Greece. The guilt of the German occupation forces is not only proven beyond a reasonable doubt but it casts a pall of shame upon a once highly respected nation and its people. The defendants themselves recognize this situation when they decry the policies of Hitler and assert that they continually protested against orders of superiors issued in conformity with the plan of terrorism and intimidation.[208]

The plea of "superior orders," although not a defense, was considered with other circumstances in mitigation in the fixing of punishment. No death sentences were imposed, but the Tribunal observed:

. . . mitigation of punishment does not in any sense of the word reduce the degree of the crime. It is more a matter of grace than of defense. In other words, the punishment assessed is not a proper criterion to be considered in evaluating the findings of the court with reference to the degree of magnitude of the crime.[209]

Field Marshal List and Lieutenant General Kuntze were con-

[207] Transcript, pp. 10447-48.

[208] *Ibid.*, pp. 10454-55 and 10456-57.

[209] *Ibid.*, p. 10542.

victed and sentenced to life imprisonment. Five other lieutenant generals drew terms of seven to twenty years. General Rendulic also was sentenced to twenty years, but was acquitted of the charges relating to the devastation of northern Norway, the court finding that under[210] "the conditions, as they appeared to the defendant at the time . . . he could honestly conclude that urgent military necessity warranted the decision made." The two defendants who had served as chiefs of staff (rather than as commanders), Lieutenant General Foertsch and Brigadier General Geitner, were acquitted of all charges. Although both had known of the criminal orders which led to the atrocities, and indeed had initialled and distributed some of them, the Tribunal concluded that their lack of "command of authority," and the "want of direct evidence placing responsibility" upon them, required their acquittal.[211]

The "Hostage Case" judgment has been much criticized in the countries formerly occupied by Germany, as well as in the Soviet-controlled German press. The sentences were attacked as unduly lenient, but much more bitter were the comments on the Tribunal's legal rulings upholding the right of an occupying power, under certain circumstances, to shoot hostages and to deny "partisans" the status of belligerents. Particularly to former members of "underground" or "resistance" movements these decisions were anathema. In Norway, the partial acquittal of Rendulic aroused a furore.

One can easily understand these protests, but, in the writer's view, they have tended to obscure the admirable workmanship of the judgment. Furthermore, these were much-mooted questions, with highly political overtones, and it is hard to criticize the court's conservative determination to apply international law "as we find it," not "as we would have it." In the long run, this may well promote the revision of international law along more enlightened lines, which is far more important than the decision with respect to these particular defendants.

210 Transcript, pp. 10513-14.

211 *Ibid.*, pp. 10498, 10501.

The other military case—known as the "High Command Case" (*United States* v. *Wilhelm von Leeb et al.,* Case No. 12), was the last Nuremberg trial to open (February 1948),[212] and the next to last to close (28 October 1948). It was heard before a reconstituted Military Tribunal V, consisting of John C. Young (former Chief Justice of the Supreme Court of Colorado) presiding, Winfield B. Hale (Judge of the Tennessee Court of Appeals), and Justin W. Harding (who had previously sat on Tribunal III for the "Justice Case").

The principal defendant, Field Marshal von Leeb, was, next to von Rundstedt, the most senior of all the German field marshals of World War II.[213] Von Leeb, von Rundstedt, and von Bock were the three supreme field commanders throughout the German Army's march of conquest up to the time of its initial setback at the gates of Leningrad and Moscow. Leeb, a specialist in defensive tactics, had held the western front while Bock and Rundstedt overran Poland; against the Russians, Leeb abandoned his defensive role and led the northern group of German armies across the Baltic countries to Leningrad, while Bock advanced on Moscow and Rundstedt overran the Ukraine.[214] Field Marshal von Kuechler, who commanded an Army in Russia under Leeb and succeeded him in 1942 as Army Group Commander, was also a defendant, as was Field Marshal Sperrle of the Luft-

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212 The indictment was filed 28 November 1947, and the defendants were arraigned 30 December 1947. James McHaney (of Little Rock, Arkansas), Deputy Chief Counsel, was in charge of the prosecution until May 1948, after which his deputy, Paul Niederman (of Chicago), was in charge. Walter H. Rapp (of San Francisco) and Baucom Fulkerson (of Little Rock, Arkansas) also took leading parts, assisted by Arnost Horlik-Hochwald and Paul Horecky (of Czechoslovakia), Morton Barbour and Eugene H. Dobbs (of New York City), and James R. Higgins (of Pottsville, Pennsylvania).

213 In the "rank list" of field marshals von Leeb stood fifth, but von Brauchitsch, von Bock, and Keitel who (as well as Rundstedt) stood ahead of him, were all his juniors. Leeb and Rundstedt were both in retirement when the war broke out in 1939.

214 All three of them relinquished their commands in 1942, and Leeb and Bock remained in retirement thereafter; Rundstedt returned to the fray as Commander in Chief in the West.

waffe.[215] The other defendants included five generals[216] and two lieutenant generals who had held high field commands, Admiral Otto Schniewind (Chief of the Naval War Staff under Raeder), two lieutenant generals from Hitler's immediate military staff, and Lieutenant General Lehmann, the Judge Advocate General of the Wehrmacht.

All the defendants were accused of planning and waging aggressive wars, and the evidence showed that many of them had attended the major conferences at which Hitler announced his intentions to invade Poland, the Low Countries, Russia, and other nations, a circumstance upon which the IMT had leaned heavily in convicting Keitel, Jodl, Raeder, and von Neurath of "crimes against peace."[217] The defendants who had not attended the Hitler conferences had all been privy to, and some had participated in drafting, the actual invasion plans. However, despite these circumstances, the Tribunal did not see fit to discuss the evidence. According to the Tribunal, knowledge of Hitler's aggressive intentions and participation in the planning and initiation of aggressive wars was "not sufficient to make participation even by high ranking military officers in the war criminal." It was also necessary—

> that the possessor of such knowledge, after he acquires it, shall be in a position to shape or influence the policy that brings about its initiation or its continuance after initiation, either by furthering, or by hindering or preventing it.[218]

Without any discussion of the functions discharged by or the proven activities of any of the individual defendants, the court concluded that "the defendants were not on the policy level," and all were found not guilty.[219]

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215 Sperrle had commanded the so-called "Condor Legion" in Spain, and during the war headed the German air forces in Western Europe.

216 One of these, General Blaskowitz, committed suicide in Nuremberg Jail on the opening day of the trial.

217 *Trial of the Major War Criminals,* Vol. I, pp. 188-92, 288-89, 315-16, 322-23, and 333-34.

218 Transcript, p. 10034.

219 *Ibid.,* p. 10038.

The charges established against the defendants with respect to war crimes and crimes against humanity were very sweeping. Orders had been circulated throughout the Wehrmacht for the execution of all "commandos" and "political commissars," even though taken captive in uniform on the field of battle. Despite some murmerings against these orders, they had been carried out in many instances, the "Commando Order" chiefly on the western front and the "Commissar Order" on the eastern front. Other extensive crimes against prisoners of war were held to have been proved. Nor was the German Army's record in the treatment of civilians in occupied countries any better. The Army had participated in the deportation of hundreds of thousands of civilians from their homelands to forced labor in Germany; the dreaded SS "Einsatzgruppen," that had slaughtered over a million Jews on the eastern front, had carried on these murderous activities in cooperation with the German Army, which had fed, transported, and billeted them, and supported them in other ways. At least three of the defendants had personally participated in drafting criminal orders such as the "Commissar" and "Commando" orders, and most of the other defendants were directly implicated in their execution.

The German Navy and Air Force were not nearly as deeply involved in these atrocities as was the Army, and Field Marshal Sperrle and Admiral Schniewind were acquitted of all charges. The other eleven defendants were all convicted. Two of them (Lieutenant Generals Warlimont and Reinecke, from Hitler's immediate military staff) were sentenced to life imprisonment. Field Marshal von Kuechler received a term of twenty years, as did two other defendants; the other sentences, except for that of Field Marshal von Leeb, ranged from five to fifteen years. Leeb was convicted on a single charge and sentenced to three years' imprisonment, but he had already spent a slightly longer period in confinement awaiting and during trial, and was therefore immediately released.

Many of the defendants in the cases which have already been described held high positions in the government of the Third Reich, and might appropriately fall under this rather broad classification. For example, Karl Brandt as Reich Commissioner for Health and Sanitation, and Schlegelberger as Acting Reich Minister of Justice, occupied the highest positions in the medical hierarchy and the judicial system respectively, and discharged ministerial responsibilities, but they were indicted and tried together with other members of their profession rather than with their ministerial colleagues.

The first of all the Nuremberg judgments under Control Council Law No. 10 was rendered in the case of Erhard Milch, who was the sole defendant in the proceeding (*United States* v. *Erhard Milch,* Case No. 2).[220] Milch held the rank of Field Marshal in the Luftwaffe, and was Goering's principal deputy in the Air Ministry, but the principal charges against him related to his administrative activities as a member of the "Central Planning Board," established by a Hitler decree of 29 October 1943. The dominant member of the "Central Planning Board" was Albert Speer, tried and convicted by the IMT, which also found[221] that the Board "had supreme authority for the scheduling of German production and the allocation and development of raw materials" and that "the Board had authority to instruct Sauckel [also tried and convicted by the IMT] to provide laborers for industries under its control." Sauckel and Speer were both convicted by the IMT chiefly on the basis of their participation in the "slave labor program," and this was the principal charge brought against Milch. He was also accused of complicity in the medical experiments (high altitude and freezing) conducted at Dachau for the benefit of the German Air Force.

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220 This was the only Nuremberg trial in which there was but a single defendant. Next in size was the "Flick Case," in which six were tried; in all the other indictments twelve or more defendants were named.

221 *Trial of the Major War Criminals,* Vol. I, p. 331.

The "Milch Case" was tried before Military Tribunal II as originally constituted,[222] which rendered its judgment on 16 April 1947.[223] The Tribunal held that Milch's guilt for the medical experiments had not been established beyond reasonable doubt, and acquitted him on that charge. But his responsibility, along with that of Speer and Sauckel and others, for the "slave labor program" was held conclusively proven; on this charge he was convicted and sentenced to imprisonment for life.[224]

The largest, longest, and last of the Nuremberg trials was primarily concerned with the activities of government officials, and consequently has become known as the "Ministries" or "Wilhelmstrasse" Case (*United States* v. *Ernst Weizsaecker et al.*, Case No. 11). It was heard by Military Tribunal IV, presided over by William C. Christianson (who had sat as a member of this Tribunal in the "Flick Case"), and its other members were Leon W. Powers (formerly of the Iowa Supreme Court), and Robert F. Maguire (of the Oregon Bar and Standing Master in Chancery for the United States District Court of Oregon). The entire proceeding lasted seventeen months, from the filing of the indictment on 15 November 1947 to the imposition of sentences following judgment on 14 April 1949. The transcript of the testimony and the documentary evidence were most extensive; sixty-eight attorneys (including one American)[225] represented the twenty-one defendants, and thirty-four attorneys were used for all or part of the case on the prosecution side.[226]

222 This same Tribunal, with the same membership, also tried the "Pohl Case." See *supra*, pp. 293-95.

223 The Chief Prosecutor in the "Milch Case" was Clark Denney of New York City, assisted by James Conway (Yonkers, New York), Henry T. King, Jr. (Meriden, Connecticut), Raymond J. McMahon, Jr. (Pawtucket, Rhode Island), and Maurice C. Myers (Los Angeles, California).

224 In addition to the opinion of the Tribunal, Judges Phillips and Musmanno wrote separate concurring opinions.

225 Warren Magee of Washington, D.C.

226 The "political" segment of the prosecution was under the charge of Dr. Robert M. W. Kempner, Deputy Chief of Counsel, assisted by Alexander G. Hardy (Washington, D.C.), H. W. William Caming (New York City), Alvin Landis (Beverly Hills, California), Mrs. Dorothea G. Minskoff (Silver Spring, Maryland), John Lewis (Suffern, New York), Arthur L. Petersen (New York City), John J. Posner (Brooklyn, New York), and Ralph Goodman (New

Of twenty-one defendants, eighteen[227] were ministers or high functionaries in the civil administration of the Third Reich. The defendant von Weizsaecker was a career diplomat who had been Minister to Norway and Switzerland and who became Undersecretary (*Staatssekretaer*) of the German Foreign Office at the time when Ribbentrop replaced von Neurath as Foreign Minister. In 1943 he became ambassador to the Vatican and was replaced by Steengracht von Moyland, who was also a defendant, as were several other Foreign Office officials. At the cabinet level, other defendants included Hans Lammers (Reich Minister and Chief of the Reich Chancellery), Darre (Minister for Food and Agriculture), and Schwerin von Krosigk (Minister of Finance), as well as other well-known political figures of the Third Reich such as Otto Dietrich (second only to Goebbels in the Propaganda Ministry). On the "economic" side the defendants included Emil Puhl (Vice President of the Reichsbank), Paul Koerner (Deputy to Goering in the Office of the Four Year Plan), Paul Pleiger (the dominant figure in the huge "Hermann Goering Works"), and Hans Kehrl (who held a number of high governmental economic positions). Except for the exclusion of military leaders, and a higher proportion of diplomatic and economic officials, the composition of the dock paralleled that of the trial before the IMT.

The indictment charged a majority of the defendants with the commission of crimes against peace (Counts One and Two). Seven of the defendants were charged with war crimes, including complicity in the "lynching" of Allied aviators, and the murder and mistreatment of prisoners of war (Count Three). Thirteen of the defendants were accused of crimes against humanity committed against German nationals prior to the out-

York City). The "economic" aspect of the case was handled successively by Rawlings Ragland (Washington, D.C.), Charles S. Lyon (New York City), and Morris Amchan, all Deputy Chiefs of Counsel, with the assistance of Paul H. Gantt, James M. Fitzpatrick (Washington, D.C.), Walter J. Rockler (Chicago, Illinois) and Walter W. O'Haire (Pittston, Pennsylvania).

227 The other three were SS Generals Berger and Schellenberg (*supra*, p. 302) and the banker, Karl Rasche (*supra*, pp. 319-20).

break of war (Count Four), but after argument the Tribunal dismissed this count as outside its competence, on grounds generally parallel to those relied upon by the IMT in the same connection. All of the defendants were accused of war crimes and crimes against humanity committed against civilian populations after the outbreak of war, including the persecution and extermination of racial and religious groups (Count Five), plunder and spoliation of property in occupied countries (Count Six), and deportation to forced labor (Count Seven). Most of the defendants were also members of the SS or the Leadership Corps of the Nazi Party and were charged accordingly (Count Eight).

The court proceedings ended in November 1948, but the Tribunal took five months to prepare its judgment, which is correspondingly lengthy and meticulous.[228] Two of the defendants[229] were acquitted of all charges and one was found guilty only of membership in the SS and the Nazi Party Leadership Corps.[230] The others were all convicted on one or more counts involving crimes against peace, war crimes, and crimes against humanity.

Much attention had been focussed during the trial on the fate of von Weizsaecker, who was a personable and educated diplomat with numerous prominent friends in several European countries. The evidence concerning his activities as Ribbentrop's deputy was weighed by the Tribunal with the utmost care, and von Weizsaecker was acquitted on numerous charges. However, the Tribunal found him guilty of participating in the unlawful invasion and occupation of Bohemia and Moravia in March 1939, and of complicity in the deportation of Jews from several European countries to enslavement and extermination in concentration camps such as Auschwitz. The conviction of von

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228 The judgment is 833 pages in length.

229 Otto Meissner (Chief of the Presidential Chancellery) and Otto von Erdmannsdorff (a Foreign Office official).

230 Ernst Bohle (Chief of the Foreign Department of the Nazi Party). Bohle had pleaded guilty to the charge of membership in the SS with knowledge of its criminal activities; this was the only plea of guilty ever entered in any of the Nuremberg trials.

Weizsaecker and four other defendants (Keppler and Woermann of the Foreign Office, Lammers, and Koerner) on the charge of committing "crimes against peace" was certainly the most noteworthy feature of the judgment. These convictions were all well within the principles laid down by the IMT, but, coming as they did two and a half years later and in a vastly altered international climate, they aroused widespread attention. In addition to relying upon the IMT judgment as a precedent, the Tribunal observed:

> No one would question the right of any country to use its armed forces to halt the violator in his tracks and to rescue the country attacked. Nor would there be any question but that, when this was successfully accomplished, sanctions could be applied to the individuals by whose decisions, cooperation and implementation the unlawful war or invasion was initiated and waged. Must the punishment always fall on those who were not personally responsible? May the humble citizen, who knew nothing of the reasons for his country's action, who may have been utterly deceived by its propaganda, be subject to death or wounds in battle, held as a prisoner of war, see his home destroyed by artillery or from the air, be compelled to see his wife and family suffer privations and hardships; may the owners and workers in industry see it destroyed, their merchant fleets sunk, the mariners drowned or interned; may indemnities result which must be derived from the taxes paid by the ignorant and the innocent; may all this occur and those who were actually responsible escape?
>
> The only rationale which would sustain the concept that the responsible shall escape while the innocent public suffers, is a result of the old theory that "the King can do no wrong" and that "war is the sport of Kings."[231]

The Tribunal made it clear that these principles are not applicable to Germans alone, but are universally binding:

> We may not, in justice, apply to these defendants because they are Germans, standards of duty and responsibility which are not equally applicable to the officials of the Allied Powers and to those of all nations. Nor should Germans be convicted for acts or conduct which,

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[231] Judgment, pp. 14-15.

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if committed by Americans, British, French or Russians would not subject them to legal trial and conviction.[232]

Furthermore, the Tribunal took pains to confine its judgment on the question of "crimes against peace" within the traditional limits of criminal law; no defendant was convicted on this ground merely because of his position or because of his pursuit of the normal functions of a diplomat or a civil servant. In this connection the Tribunal stated:

> Obviously, no man may be condemned for fighting in what he believes is the defense of his native land, even though his belief be mistaken. Nor can he be expected to undertake an independent investigation to determine whether or not the cause for which he fights is the result of an aggressive act of his own government. One can be guilty only where knowledge of aggression in fact exists, and it is not sufficient that he have suspicions that the war is aggressive.
>
> Any other test of guilt would involve a standard of conduct both impracticable and unjust.[233]

The bulk of the Tribunal's opinion was devoted to a careful analysis of the evidence bearing on each defendant with respect to the charges brought against him, and there is no need here to rehearse these individual judgments in detail. Considering the gravity of the offenses for which the defendants were convicted, the sentences are perhaps somewhat lenient. Lammers, who was found guilty under five counts of the indictment, and Veesenmayer, who was Plenipotentiary of the Reich in Hungary and found to be deeply implicated in the deportation of Hungarian Jews to the Eastern concentration camps, were each sentenced to twenty years' imprisonment. The Nuremberg tribunals have customarily viewed participation in the "slave-labor program" as a particularly serious crime, and Koerner, Pleiger, and Kehrl (all convicted on this charge, as well as others) received fifteen-year sentences. The other terms ranged from four to ten years[234]

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[232] *Ibid.*, p. 7.

[233] *Ibid.*, p. 41.

[234] Except for the defendant Stuckart, who was found to be so seriously ill that a prison term would endanger his life, and who was therefore sentenced only for the length of time which he had spent in confinement prior to and during trial.

in length, with Weizsaecker receiving a sentence of seven years. One might well quarrel with sentences as low as seven years for such "die-hard" Nazis as Darre and Dietrich, each of whom was convicted under three counts of the indictment, but no doubt the Tribunal was governed in its decision by its evaluation of the evidence of actual criminality under the definitions laid down in Control Council Law No. 10 rather than by the depth of the Party hue. Certainly the judgment as a whole was a distinguished and monumental piece of work, workmanlike and penetrating throughout. One of the members of the Tribunal (Judge Powers) filed a lengthy dissenting opinion, but concurred in the judgment of the Tribunal under Counts Seven and Eight of the indictment.

V

SOME LEGAL PROBLEMS

As was stated at the outset, the Nuremberg trials are not of concern to lawyers alone, and in the concluding portions of this article emphasis will be laid on their importance in current world affairs, as well as to social scientists and to scholars and professional men in general. Furthermore, in the course of describing the several trials and the judgments rendered therein, most of the major legal questions have been touched upon, and quotations from the judgments have indicated how the judges approached these matters.

Nevertheless, it may be useful to approach again a few of the more important legal problems, and attempt to draw together the strands of thought from all the judgments. In an article of this limited compass, only the most tentative and sketchy reference to these problems can be made; likewise, numerous questions of considerable interest must be entirely passed over.

Sources and Nature of International Law

Looking back over the four years during which the Nuremberg trials have been planned and carried out, it is apparent that two conceptions or circumstances have stood in the way of universal acceptance of the Nuremberg principles among jurists. The first is that there is no international legislature which can, by statutory process, define international crimes, prescribe penalties, and establish judicial machinery for the enforcement of international law. From this circumstance stem the objections derived by Continental lawyers under the maxim *nullum crimen nulla poena sine lege,* and raised by American lawyers by analogy from the *ex post facto* clause of the Constitution. The second is the fact that the judges on the Nuremberg Tribunals (as on nearly all if not all other war crimes tribunals) were composed of citizens of the victorious powers, whereas the defendants were citizens of the vanquished nations; this state of affairs has aroused

criticism because of the belief that there should be no "adverse interest" between the judges and the accused.

These two conceptions, however, important as they are, have not carried enough weight in governmental circles to prevent the carrying out of the trials, nor have they proved sufficiently convincing in legal circles to counterbalance the general, though by no means universal, feeling that the Nuremberg principles are fundamentally sound. Despite the absence of any international statutes, it cannot be seriously urged that the defendants at Nuremberg did not know that the acts charged against them were wrongful, or that there was any element of surprise or other unfairness in bringing them to book. As for the problem of the "victors and the vanquished," experience with the Leipzig trials after the first World War offered a compelling rejoinder to those few who urged that war criminals should be remitted to trial and punishment by their own governments. More frequently, perhaps, it has been suggested that the tribunals should have been composed of representatives of the neutral nations; but these proposals were generally, and it is believed, rightly disregarded as unrealistic, if only because the number of truly "neutral" countries was so small that this solution would have proved entirely unfeasible. Indeed, in retrospect it appears to the writer that the highest possible degree of "fairness" was achieved by virtue of the very circumstance that the judges were acutely aware of their position as citizens of a victorious power.

The controversy which the trials have raised in these respects, nevertheless, points the way to one of the most fruitful fields for legal scholarship and research in the postwar world. The trials are but one manifestation of the world-wide striving after what has been called "world order under the rule of law,"[235] as manifested in the United Nations and a large number of other semi-official or unofficial international organizations. What international law is, and how it comes into being, is certainly not a new question, and indeed is the subject of the first chapter of

[235] *A Project for a World Law School* (Harvard Law School, 1948), p. 5.

most standard textbooks on the subject. But now the question has assumed momentous practical importance, for the governments and peoples of the world are beginning to look to international law as a real force in international affairs. The tense diplomatic situation, rearmament, and the reemergence of groups of nations bound together by alliances or common aims only underline the almost desperate character of the efforts being made to establish a true community of all nations, acting together under generally accepted standards.

How do we recognize international law when it comes into being? An objection frequently leveled against the Nuremberg trials is that the act of planning or waging an aggressive war cannot be considered a crime because there is no single authoritative "definition" of aggressive war. Certainly this is true, except to the extent that the words define themselves, which, the writer believes, was amply sufficient for the "clear cases" abundantly proven by the Nuremberg documentation. No one can read the accounts of the Hitler conferences with his generals without concluding that the wars of the Third Reich were aggressive wars under any conceivable definition of that expression. None the less, this search for a "definition" illustrates a fundamental problem about the nature of international law, and suggests that it may be useful to recall how our own common law came into being centuries ago. The crime of murder is now defined in the penal codes of most of our states, but any lawyer knows that these definitions have their origin in a multitude of early decisions, and that murder was punished centuries before we had codes or legislatures or even learned legal texts. The early communities sensed that their survival as such depended upon the establishment of a measure of peace and order, and the punishment of those who breached the peace. They did not look for authoritative definitions. They developed machinery for the trial and punishment of offenders which grew more elaborate as life grew more complicated, and after a multitude of cases the basis for a precise definition began to emerge.

Surely it is apparent that international law is today in much

the same state of development as was the common law centuries ago. If we reject international law unless it is embodied in codes and statutes, with all the paraphernalia of modern national judicial systems, we shall never find it at all, for it cannot exist in this form without a correspondingly highly developed world political organization. And it is, indeed, from the very process of enforcing law that political institutions develop. At all events, here is a most rewarding field for scholarly exploration of immediate practical importance in the world of affairs.

Crimes Against Peace

In an earlier part of this article, the IMT's treatment of the charge that the defendants planned and waged aggressive war has been sketched. Since the IMT judgment, six additional cases involving this charge have been determined as described above. In the four such cases at Nuremberg, the accusation failed against the military leaders and the Farben and Krupp directors, but prevailed against five highly placed diplomats and government ministers. On 30 June 1948, a Tribunal sitting at Rastatt (in the French Zone)[236] convicted the prominent Saar industrialist Hermann Roechling of waging, but not of planning, aggressive wars (as well as of economic spoliation and the deportation and enslavement of civilian populations), but upon review of the judgment, in January 1949, this charge was quashed.[237] At Tokyo, however, the International Military Tribunal for the Far East convicted all of the twenty-five Japanese defendants of "crimes against peace."

Although most of the criticism of this concept has centered on the lack of any authoritative definition of "aggressive war," obviously this factor was not regarded by the judges as the major difficulty in any of these cases; the evidence establishing the ag-

236 The Tribunal was constituted under Control Council Law No. 10, and was composed of one Belgian, one Dutch, and five French judges. It was presided over by the well-known French judge, Marcel Pihier.

237 The other charges, however, were sustained, and Roechling was sentenced to ten years' imprisonment and the forfeiture of all his property.

gressive nature of the German and Japanese wars was too compelling.[238] The question that proved most troublesome was how to assess the accused individual's relation to unlawful enterprise. What degree of *knowledge* of the plans or of the aggressive character of the war must he have possessed? What type of *action* must he have taken? How *important a position* must he have occupied and *how influential* in determining national policy must he have been? *At what stage* of the criminal enterprise must he have become involved? Is it sufficient that he merely *waged* aggressive war after its inception if he had no share in its planning or initiation?

It can hardly be said that the later Nuremberg judgments carried the analysis of these questions much beyond, if indeed as far as, the pronouncements of the IMT. It is to be regretted that the judgments in the "Farben" and "High Command" cases for the most part bypassed the problems raised by the specific evidence relating to the individual defendants, and relied chiefly on such general phrases as "followers and not leaders" and "policy-making level." Were Keitel (convicted by the IMT), Hitler's military administrative assistant, with little or no influence on strategy, and Doenitz (also convicted by the IMT), a rear admiral in command of submarines, "policy makers" any more than Admiral Schniewind (acquitted in the High Command Case), the Chief of the Naval War Staff within which the plan for the invasions of Norway and Denmark originated?

The Court's opinion in the "Ministries Case" on the aggressive war charge is an eloquent and effective restatement of the basic concept, but the factual situations with which it dealt fall well within the ambit of the IMT judgment; the convictions of Lammers and Koerner are parallel to those of Frick and Funk, respectively, and Weizsaecker (as well as Keppler and Woermann) labored, at the next lower level, in the same vineyard as Ribbentrop. The case does establish, however, that the conquests of Austria and Bohemia and Moravia were "crimes against

[238] Of course, in future cases this problem might present far greater difficulties.

peace"[239] (Judge Powers dissenting), and this holding lays at rest the notion that a great power can, with legal impunity, mass such large forces to threaten a weaker country that the latter succumbs without the necessity of a "shooting war." And, coming when it did, the judgment is a powerful reminder that legal principles which have been judicially enforced cannot easily be buried and exhumed with each shift in the international winds.

War Crimes

Except with respect to the status and rights of "partisans" and "guerrillas," the Nuremberg trials do not shed much new light on the laws of war relating to combat. Aerial warfare had been waged on both sides with great violence and was not involved in any of the judgments.[240] Submarine warfare was dealt with by the IMT in the judgments concerning Raeder and Doenitz, but the IMT concluded that German submarine practices had not differed markedly from those of the Allied Powers, and did not penalize the defendants in this particular. The charges relating to prisoners of war for the most part involved abuses, such as the "Commando" and "Commissar" orders, which were so flagrant that they could not be condoned if the protected status of prisoners of war was to continue to have any substance or vitality whatsoever. The decision in the "Hostage Case" that ununiformed guerrillas and franc-tireurs cannot claim belligerent status, as has been seen, aroused criticism in many European countries, and no doubt will stimulate efforts to reconsider the provisions of the Hague and Geneva Conventions relating to this controversial question.

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[239] This the IMT had not done, because the invasions of Austria and Czechoslovakia were not charged in the indictment as independent "crimes against peace," but only as steps in the unfolding of the conspiracy. The IMT, however, declared that they were "aggressive acts."

[240] It is apparent, however, that the legality (as well as the efficacy) of so-called "strategic-bombing" intended to destroy civilian lives and housing (as distinguished from attacks directed against military targets such as factories and communications) is becoming a focus of controversy, with definite political overtones. See *Fear, War, and the Bomb,* by P. M. S. Blackett (1949), *The Second World War,* by Major General J. F. C. Fuller (1949), and *Bombing and Strategy,* by Admiral Sir Gerald Dickens (1946), among works discussing this question.

With respect to the laws of war governing the relations between civilian populations and military occupation authorities, the Nuremberg decisions have covered, in great detail, a wide variety of questions. The laws of war with respect to economic exploitation of an occupied country were reviewed and applied in numerous and diverse circumstances, brought to light in the industrialists trials. The scope of responsibility for the deportation to forced labor of civilians in occupied territory was explored in nine of the trials, wherein government officials, military leaders, industrialists, the police, and the judiciary were involved. Taken as a whole, these decisions constitute both a reaffirmation and a refinement of the principles laid down in the Hague Conventions. Here again the most controversial ruling was made in the "Hostage Case," wherein the court reluctantly held that the laws of war do not now prohibit the killing of hostages under certain specified circumstances. In so doing, the Tribunal practically invited revision of the Hague Conventions so as to expressly forbid the killing of hostages in the future. The records and judgments of the Nuremberg trials, containing as they do extensive testimony—both oral and documentary—by military experts and others, furnish a unique and extensive source for restating the laws of war so as to provide the maximum practical degree of protection to the civilian populations of occupied territory.

Crimes Against Humanity

None of the Nuremberg judgments squarely passed on the question whether mass atrocities committed by or with the approval of a government against a racial or religious group of its own inhabitants in peacetime constitute crimes under international law. Such a contention was made by the prosecution before the IMT, but the Tribunal disposed of this charge by holding that the language of the London Charter limited its jurisdiction to such crimes as were committed in the course of or in connection with aggressive war. Again in the "Flick Case" and in the "Ministries Case" the prosecution raised the same

question; in each indictment an entire count was devoted to the charge of prewar atrocities, chiefly against Jews. Although the language of Law No. 10 defining "crimes against humanity" differed in certain particulars from the comparable definition in the London Charter, the "Flick" and "Ministries" tribunals followed the decision of the IMT and declined to take jurisdiction of the charge.

However, in two other Nuremberg cases where the question was raised only collaterally, the Nuremberg tribunals made significant and important observations on this question. Thus, in the "Einsatzgruppen Case" the Jewish exterminations of which the defendants were accused occurred during and after 1941, but it was charged that these murders constituted not only "war crimes" but also "crimes against humanity." Since no acts prior to 1939 were involved the Tribunal had no occasion to pass upon the question of construction of Law No. 10 which confronted the "Flick" and "Ministries" tribunals. But in convicting the defendants of "crimes against humanity" the court expressly stated that "this law is not limited to offenses committed during war,"[241] and observed that—

> Crimes against humanity are acts committed in the course of wholesale and systematic violation of life and liberty. It is to be observed that insofar as international jurisdiction is concerned the concept of crimes against humanity does not apply to offenses for which the criminal code of any well-ordered State makes adequate provision. They can only come within the purview of this basic code of humanity because the State involved, owing to indifference, impotency or complicity, has been unable or has refused to halt the crimes and punish the criminals.[242]

So, too, in the "Justice Case," where "crimes against humanity" committed after 1939 were also charged against the defendants, the Tribunal stated:

> . . . it can no longer be said that violations of the laws and customs of war are the only offenses recognized by common international law.

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241 Transcript, p. 6768.

242 *Ibid.*, p. 6767.

The force of circumstance, the grim fact of worldwide interdependence, and the moral pressure of public opinion have resulted in international recognition that certain crimes against humanity committed by Nazi authority against German nationals constituted violations not alone of statute but also of common international law.[243]

The court proceeded to review a number of incidents extending over a century where nations or their chiefs of state had intervened or protested against religious or racial atrocities in Turkey, Rumania, and elsewhere, and quoted with approval[244] Bluntschli's statement that "states are allowed to interfere in the name of international law if 'human rights' are violated to the detriment of any single race."[245]

The practical importance of this question can hardly be overstated, and the convention recently concluded by the United Nations on the subject of "genocide" is a manifestation of the lively interest which it has awakened. Important as is the concept of "aggressive war," and beneficent as the Hague and Geneva Conventions may be, we can hardly expect much further judicial development and interpretation of "crimes against peace" or "war crimes" except in the unhappy event of another war. The concept of "crimes against humanity," however, if it becomes an established part of international penal law—as it seems to be doing—will be of the greatest practical importance in peacetime. Indeed, it may prove to be a most important safeguard against future wars, inasmuch as large-scale domestic atrocities caused by racial or religious issues always constitute a serious threat to peace.

Conspiracy and Other Questions

In all the Nuremberg trials, only eight defendants were convicted of conspiracy, those being the eight convicted by the IMT on the charge of conspiracy to initiate and wage aggressive war.

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243 *Ibid.*, p. 10641.

244 *Ibid.*, p. 10645.

245 J. K. Bluntschli, Professor of Law, Heidelberg University, in *Das moderne Voelkerrecht der civilisierten Staaten* (3d ed., 1878), p. 270.

We have seen earlier[246] that the indictment before the IMT was drawn on the theory that conspiracy was the broadest of all the charges, but that the IMT treated it as the narrowest. Not only did they convict four defendants on the substantive charge of planning and waging aggressive war who had been acquitted on the conspiracy count, but also they dismissed entirely the charge of conspiracy to commit war crimes and crimes against humanity as beyond their jurisdiction under the language of the London Charter. It became apparent during the IMT trial, not only from the arguments of defense counsel but from the reactions of the Continental members of the Tribunal, that many European jurists view the Anglo-Saxon concept of criminal conspiracy with deep suspicion. Indeed, after the close of the IMT proceedings the French member of the Tribunal (Professor Donnedieu de Vabres) delivered a public lecture in which he uttered some very harsh words about conspiracy and made it plain that he, for one, had endeavored at Nuremberg to confine that doctrine to the narrowest limits.[247] It is an interesting contrast that Mr. Henry L. Stimson, in one of the most distinguished pieces of writing on the Nuremberg trials, declared that in his opinion the principal defect in the IMT's judgment was the very limited scope which had been allowed to the doctrine of conspiracy.[248]

In the four subsequent Nuremberg trials in which the defendants were accused of planning and waging aggressive war they were also accused of conspiracy to that end. In all four cases the charge was rejected, as was inevitable in the three cases in which the substantive accusation itself failed. Even in the "Ministries Case," where five defendants were convicted of initiating aggressive wars, the court dismissed the conspiracy charge with the summary statement that "The Tribunal is of the opinion that no evidence has been offered to substantiate a con-

246 *Supra*, p. 269.

247 "Le Procès de Nuremberg," by Donnedieu de Vabres (1947).

248 "The Nuremberg Trial: Landmark in Law," *op. cit.*

viction of the defendants in a common plan and conspiracy."[249]

In three of the early Nuremberg trials under Law No. 10,[250] the prosecution charged the defendants with conspiracy to commit war crimes and crimes against humanity. Here, as in the case of crimes against humanity committed prior to 1939, there were certain differences between the wording of the London Charter and that of Law No. 10 upon which the prosecution relied, but once again the Nuremberg tribunals followed the IMT determination. The members of all the tribunals sat *en banc* to hear argument on this point—the only such *en banc* session that was ever held—and thereafter the three tribunals before which the question was pending issued identical rulings dismissing the conspiracy charge.

The problem of conspiracy, which so troubled the German lawyers and European judges at Nuremberg, at bottom is merely one manifestation of a problem which is basic in all systems of penal law: What degree of connection with a crime must be established in order to attribute judicial guilt to a defendant? Other concepts relating to this same problem are those of principals, accessories, accomplices, and attempts. Of course, these words merely denote certain factual relationships with which any system of penal law must cope, and Continental systems of law have other words and phrases to meet these same situations. Neither the London Charter nor Law No. 10 undertook to spell out the application of these concepts in trials held under their authority, although the London Charter did make reference to "leaders, organizers, instigators, and accomplices,"[251] and Law No. 10 declared (Article II, paragraph 2) that any person should be deemed to have committed the crimes defined therein "if he (*a*) was a principal or (*b*) was an accessory to the commission of any such crime or ordered or abetted the same or (*c*) took a consenting part therein or (*d*) was connected with plans

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249 Judgment, p. 192.

250 The "Medical Case," the "Justice Case," and the "Pohl Case" (Cases 1, 3, and 4 respectively).

251 This language is found in the concluding paragraph of Article 6.

or enterprises involving its commission or (*e*) was a member of any organization or group connected with the commission of any such crime or (*f*) with reference to . . . [crimes against peace], if he held a high political, civil or military (including General Staff) position in Germany or in one of its Allies, co-belligerents or satellites or held high position in the financial, industrial or economic life of any such country."[252] This is a relatively comprehensive listing of various types of relation to crime to which guilt may be imputed, but it is obviously not intended to be exhaustive. For example, it makes no reference to attempts. Does it follow that an attempt to commit an international crime is not itself a crime? One may assume that a soldier is about to shoot an unarmed and innocent prisoner of war, but is himself captured, with his pistol poised, just in time to prevent the shooting. It would appear, by analogy from almost all systems of domestic law, that he could be rightly convicted under the laws of war for the attempted murder of a prisoner of war. But the example may serve to illustrate that the comparison and reconciliation of different systems of penal law, as they relate to this question of guilty connection with attempted crime, are an essential step in the establishment of a permanent international penal jurisdiction.

The same holds true in the field of legal procedure. The procedures at Nuremberg were largely the product of evolution based on actual experience there. Many difficult and unusual questions arose out of the mixture of different legal systems. The evidentiary weight to be given hearsay evidence or affidavits is a good example of this type of problem. A description and analysis of procedural problems met and determined at Nuremberg (and in other war crimes trials) would, it is suggested, be a most useful study, from which the basic outlines of a code of international legal procedure should emerge.

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[252] At Nuremberg the prosecution (and the tribunals) took the position that clause (*f*) was not intended automatically to render guilty anyone who held a high position, but, rather, to indicate that the holding of such position should be taken into account, along with all other circumstances, in determining the degree of an individual's participation in "crimes against peace," as well as the extent of his guilty knowledge.

VI

HISTORICAL FEATURES: JODL AND HALDER DIARIES

Although this discussion is concerned with the Nuremberg trials from the standpoint of law and the development of international law, the value of the Nuremberg records to the historical and political scientist cannot be passed over without mention here. Indeed, in numerous branches of science and for all professional men and scholars the record of one or more of the Nuremberg cases will be found of especial interest. The "Medical Case," for example, has already attracted widespread attention among physicians and psychiatrists.[253] The SS cases in particular, and the testimony of comparatively well-educated and intelligent SS fanatics such as Gebhardt and Ohlendorf, offer a fascinating field for exploration by the psychologist and psychiatrist. The weird "racial theories" which the Race and Resettlement Office of the SS endeavored to put into practical effect may be traced in the record of the "RuSHA Case," and will well repay study by ethnologists and sociologists. But it is to the historian and political scientist that the Nuremberg records have most to offer, and it may be useful to indicate what these records consist of and where they may be found. The most important items are the following:

(*a*) The transcript of testimony and documents in the trial held by the International Military Tribunal. These have been published in the English language in an official series entitled *Trial of the Major War Criminals before the International Military Tribunal,* and publication in the German and French languages is in progress.[254]

(*b*) The testimony relating to the "organizations" (such as

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253 See, for example, *Doctors of Infamy—The Story of the Nazi Medical Crimes,* translated from the German work by Mitscherlich and Mielke (Henry Schuman, Inc., 1949).

254 Possibly also in Russian, but on this point the writer has no recent information.

the SS, the General Staff, etc.) against which a definition of criminality was sought in the IMT trial, heard by commissioners appointed by the IMT. Much of this testimony is of little permanent historical interest, but the testimony given with respect to the General Staff and the Reich Cabinet is of considerable importance. Records of these "Commission Proceedings" exist only in English and in mimeographed form; they will be deposited in leading universities and other libraries in the United States, and the certified copy will be deposited with the original IMT records at The Hague.

(*c*) The interrogations of defendants and prospective witnesses conducted under the direction of Colonel John H. Amen during the course of the IMT trial Only one complete set of these interrogations exists, and it is in English; the spoken German was not recorded. This set will be deposited in the National Archives.

(*d*) The similar interrogations conducted during the twelve subsequent Nuremberg trials, under the direction of Mr. Walter Rapp. Summaries of these interrogations in English are being deposited in the principal libraries. One set of the interrogations themselves, in the original tongue (for the most part German), will be deposited in the National Archives.

(*e*) The original records of the twelve Nuremberg trials under Law No. 10 will be deposited in the National Archives. Mimeographed versions of the transcript and documents of these trials will be deposited in leading libraries in the United States and in Europe.

(*f*) Many of the documents which became available during the IMT trial, a number of the briefs prepared by the IMT prosecution staff, and a few of Colonel Amen's interrogations, as well as other selected documents relating to the trials, have been published in a series of official U.S. Government volumes entitled *Nazi Conspiracy and Aggression*.

(*g*) Preparations are under way for the publication of the indictments, judgments, and other important records of the

twelve trials under Law No. 10 in a series of fifteen official government volumes.

The Nuremberg documentation is amazingly profuse and enlightening. In part, at least, this is due to what appears to be a Teutonic penchant for making detailed records of events and conversations. That so much of this documentation fell into Allied hands was largely due to the rapidity and completeness of Germany's final military collapse. No well-rounded study of German or European affairs since the first World War can now be made without taking full account of these documents, in particular those offered in the trials of the diplomats, industrialists, and military leaders. The "Krupp" documents are especially revealing concerning the years from 1920 to 1935, and the "Farben" and "military" documents are of prime importance for the period from 1933 to 1940. Two of the "military" documents—the diaries of Generals Jodl and Halder—deserve special mention.

The first installment of the Jodl diary covers the period from 4 January 1937 to 29 September 1938, during which Jodl served under von Blomberg at the War Ministry (up to February 1938) and thereafter under Keitel in the OKW (*Oberkommando der Wehrmacht,* or High Command of the Armed Forces). It touches on German intervention in the Spanish Civil War and other interesting matters during 1937. But its main value is the light it sheds on the Blomberg-Fritsch crisis of February 1938, the annexation of Austria, and the Munich crisis. Jodl left Berlin to take command of an artillery regiment soon after Munich, and there is a gap in his diary from September 1938 to August 1939, when he returned to Berlin to become Chief of the Operations Staff of the OKW just prior to the invasion of Poland. This second portion of the diary covers the conquest of Poland, the occupation of Norway and Denmark, and the opening phases of the campaign in the west. Jodl's diary reflects the viewpoint of an officer serving at Hitler's military headquarters, and is most illuminating when read in conjunction with the diary

of General Halder, which was written at the headquarters of the German Army.

General Franz Halder was Chief of the General Staff of the German Army from November 1938 to September 1942. Up to December 1941 he served under Field Marshal von Brauchitsch, and thereafter directly under Hitler, who personally assumed the functions of Commander in Chief of the Army when Brauchitsch was relieved. The available portions of Halder's diary begin in early August 1939, and thus cover the whole course of the war up to the beginnings of the Stalingrad disaster, when Halder himself was relieved. The original diary is written in Gabelsberger shorthand, at which Halder was proficient, and as a result the diary is extremely full and detailed. Up to the time of the attack on the Soviet Union in June 1941 the diary contains much political as well as military information; thereafter Halder was on the eastern front and cut off from many of his contacts in Berlin and elsewhere, and the diary is concerned almost exclusively with the conduct of the Russian campaign.

Those portions of the Jodl diary which were introduced during the IMT trial are available in the official IMT record.[255] The entire Jodl and Halder diaries were offered in evidence in the "High Command Case." They are, it is believed, of such prime historical importance that they should be published in full.

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[255] In the official IMT record these portions were printed in the original German; an English translation of these same portions is printed in the U.S. Government series entitled *Nazi Conspiracy and Aggression* (Office of United States Chief of Counsel for Prosecution of Axis Criminality: Washington, 1946-48).

VII

CONCLUSION

At the outset of this paper, it was pointed out that the demand for the trial and punishment of war criminals was, from its very inception in the "St. James Declaration," a demand for action "through the channel of organised justice." That demand has been met. Objections to holding the trials at all did not prevail. Neither did the arguments of those who wished to punish the foremost "criminals" by summary process or without any trial whatsoever. Whatever else may be said about Nuremberg, it has not been a hasty process, nor have its judgments been rendered without prior deliberation so lengthy that the trials were commonly criticized in the press as too long rather than too short.

Nuremberg is a historical and moral fact with which, from now on, every government must reckon in its internal and external policies alike. As time goes on, the harsh and jagged contours of the Third Reich will blur. If future times prove more congenial than the recent past, memory of the atrocities will fade as war-spawned hatreds die out. All this is a consummation devoutly to be desired.

But even if a relatively peaceful era lies ahead, Nuremberg cannot be forgotten by those who created it. The criminals and their wretched deeds may pass from memory, but the trials we have no right to forget. He who undertakes to render judgment under law assumes a responsibility which he may not thereafter shed. Four nations signed the London Charter and Control Council Law No. 10—the two jurisdictional cornerstones of the Nuremberg trials—and nineteen other nations have formally proclaimed their adherence to the principles embodied therein. Representatives of the United States took the lead in formulating those principles and in establishing the Nuremberg tribunals for their enforcement. Thousands of Germans and Japanese have been tried under those principles, those found guilty have been

punished, and, as the Tribunal declared in the last of the Nuremberg judgments,

> We may not, in justice, apply to these defendants because they are German, standards of duty and responsibility which are not equally applicable to the officials of the Allied Powers and to those of all nations. Nor should Germans be convicted for acts or conduct which, if committed by Americans, British, French or Russians, would not subject them to legal trial and conviction.[256]

It is undoubtedly a dim but growing awareness that we have deeply committed ourselves to the Nuremberg principles by undertaking to judge men under them and punish men for their violation that explains the comment one so often hears today that "Nuremberg has established a dangerous precedent." This remark reflects at least three quite distinct states of mind. Some people, unfamiliar with the Nuremberg record, continue to imagine that the German diplomats were punished for drafting notes, the generals for preparing military plans or leading armies in battle, and the business men for engaging in war production. The Nuremberg record itself will dispel these illusions, and the only real problem is how to make people generally aware of its actual contents.

Others mean by this observation that, in the event that the United States should be defeated in a future war, the victorious enemy would stage a "new Nuremberg" in some American city and send our own presidents, cabinet ministers, chiefs of staff, and industrial magnates to the penitentiary or the gallows, regardless of the blameless conduct of all concerned. To this it is a sufficient answer that there is probably no human contrivance, however beneficent in design, which cannot be used or misused in unlawful and wicked pursuits. The razors with which we shave our faces become dangerous weapons in the hands of drunken waterfront thugs, and even the humble rolling-pin is an instrument to be feared in the hands of an indignant housewife. A few centuries ago many Englishmen suffered at the

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256 Judgment, p. 7.

hands of Justice Jeffreys in the "Bloody Assizes." The Nazis have just furnished us with a most eloquent demonstration of how terrible an engine of oppression and violence the judiciary may become under the aegis of a tyrannical government, but no one has seriously suggested that therefore we should abolish law in Germany, but rather that it should be cleansed and revitalized. We cannot forego the rule of law in international society because there are those who, at some future date, might seek to pervert it to our detriment.

Finally, of course, there are those few who really disagree with the Nuremberg principles themselves—who believe that the nations should be free to make aggressive war, who argue that it is folly to attempt to mitigate the ravages of war, or who seek to put some racial or religious group beyond the pale. The Third Reich was itself a compound of just such beliefs, and we may at least hope that its fate and the self-destructive nature of these arrogant delusions, as shown at Nuremberg, may help to prevent them from gaining much foothold in the minds of men.

Now that the Nuremberg trials are concluded, probably most of the doubts concerning their wisdom are those conjured up by events in the world around us. In the last analysis, the "Nuremberg question" is whether international law has intrinsic validity or practical efficacy in this day and age. In its concluding argument in the "Farben Case" at Nuremberg, the prosecution sought to explore the true nature of these doubts, and set them in the perspective of legal history:

> During the three years that have passed since the end of the war in Europe, mankind has not crossed over into Jordan. Small but terrible wars rage in Greece and Palestine, the light of democracy and freedom flickers ever more feebly in other lands, and the chorus of international voices is discordant. In our country, the fear of war has been revived by these disturbances and we are constrained to look once more to our defenses. There is talk of "cold war," and meanwhile men and women die in real wars, and the echoes of persecutions and atrocities will not be stilled. It is small wonder that some are moved to ask, "Is there a law, and if so where is it?"
>
> Murky and disheartening as these circumstances are, they represent,

if your honors please, the shortcomings of the police force, but not of the law. In legal perspective, this is an old story. The King's Peace is not easily established. In ancient times, through many a century, the robber baron sallied forth from his castle to rob and kill the wayfarer, and toyed with the lives and happiness of the serfs on his manor, and died unpunished in his bed. No doubt on many occasions not only judges and clerks, but tradesmen and peasants were moved to cry out that there is no law, and many a defendant smarted because others, perhaps more powerful, sinned with impunity. The very steps that our own country is taking today to see that its armor does not grow rusty are necessitated by parallel considerations, and find their most fundamental moral justification in that it is their purpose to fend off, not to conquer. Despite the restlessness of the times, no voice is raised today in defense of conquest, and no voice is heard to say that aggression is not a crime. There is no longer any real doubt about the law against aggression, any more than there was doubt about the law against murder or robbery in Bracton's time. The judges in Bracton's day must often have seen the King's Peace set at naught, but we can well be thankful that they did not despair and reject the very law that gave men hope of future peace and security.

Your Honors, if the complexion of world affairs has darkened since the inauguration of this court room, and if the shadows have lengthened during the course of this very trial, in the long run the law may thrive best on what now appear as obstacles to its universal enforcement. I am sure that all of us in the court room want to see this torn land once again "ready to bloom and grow fruits," as Dr. Silcher put it yesterday, but we do not want to reap another harvest of dragons' teeth. Nor can a healthful and peaceful European community be restored by drawing a shroud over the dead without benefit of inquest. Solemn as is the obligation that the defendants be given every benefit of a full and fair trial, equally solemn is the obligation to the millions in whose behalf these charges are brought that they be given the protection of law and order in a war-weary world.[257]

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[257] Transcript, pp. 15533-34.

APPENDIX

AGREEMENT BY THE GOVERNMENT OF THE UNITED STATES OF AMERICA, THE PROVISIONAL GOVERNMENT OF THE FRENCH REPUBLIC, THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND AND THE GOVERNMENT OF THE UNION OF SOVIET SOCIALIST REPUBLICS FOR THE PROSECUTION AND PUNISHMENT OF THE MAJOR WAR CRIMINALS OF THE EUROPEAN AXIS

Signed at London, August 8, 1945[1]

[ANNEX]

CHARTER OF THE INTERNATIONAL MILITARY TRIBUNAL

[EXCERPT]

II. Jurisdiction and General Principles

Article 6. The Tribunal established by the Agreement referred to in Article I hereof for the trial and punishment of the major war criminals of the European Axis countries shall have the power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations, committed any of the following crimes.

The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:

(*a*) crimes against peace: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;

(*b*) war crimes: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity;

[1] U.S. Department of State, *Executive Agreement Series* 472.

(*c*) CRIMES AGAINST HUMANITY: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.

ARTICLE 7. The official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment.

ARTICLE 8. The fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires.

ARTICLE 9. At the trial of any individual member of any group or organization the Tribunal may declare (in connection with any act of which the individual may be convicted) that the group or organization of which the individual was a member was a criminal organization.

After receipt of the Indictment the Tribunal shall give such notice as it thinks fit that the prosecution intends to ask the Tribunal to make such declaration and any member of the organization will be entitled to apply to the Tribunal for leave to be heard by the Tribunal upon the question of the criminal character of the organization. The Tribunal shall have power to allow or reject the application. If the application is allowed, the Tribunal may direct in what manner the applicants shall be represented and heard.

ARTICLE 10. In cases where a group or organization is declared criminal by the Tribunal, the competent national authority of any Signatory shall have the right to bring individuals to trial for membership therein before national, military or occupation courts. In any such case the criminal nature of the group or organization is considered proved and shall not be questioned.

ARTICLE 11. Any person convicted by the Tribunal may be charged before a national, military or occupation court, referred to in Article 10 of this Charter, with a crime other than of membership

in a criminal group or organization and such court may, after convicting him, impose upon him punishment independent of and additional to the punishment imposed by the Tribunal for participation in the criminal activities of such group or organization.

ARTICLE 12. The Tribunal shall have the right to take proceedings against a person charged with crimes set out in Article 6 of this Charter in his absence, if he has not been found or if the Tribunal, for any reason, finds it necessary, in the interests of justice, to conduct the hearing in his absence.

ARTICLE 13. The Tribunal shall draw up rules for its procedure. These rules shall not be inconsistent with the provisions of this Charter.

CONTROL COUNCIL LAW No. 10[1] and MILITARY GOVERNMENT ORDINANCES Nos. 7 and 11 are deleted. They appear as Appendices D, L, and M, respectively.

[1] *Official Gazette of the Control Council for Germany*, No. 3, 31 January 1946 (Berlin, Allied Secretariat), pp. 50-55.

STATISTICAL TABLE OF THE NUREMBERG TRIALS

Case	Number Indicted	Number Tried	Death Sentences	Life Sentences	Prison Sentences	Number Acquitted	Others
No. 1—Medical	23	23	7	5	4	7	
No. 2—Milch	1	1		1			
No. 3—Justice	16	14		4	6	4	1 suicide 1 severed
No. 4—Pohl	18	18	3	3	9	3	
No. 5—Flick	6	6			3	3	
No. 6—Farben	24	23			13	10	1 severed
No. 7—Hostage	12	10		2	6	2	1 suicide 1 severed
No. 8—RuSHA	14	14		1	12*	1	
No. 9—Einsatzgruppen	24	22	14	2	6*		1 suicide 1 severed
No. 10—Krupp	12	12			11*	1	
No. 11—Ministries	21	21			19*	2	
No. 12—High Command	14	13		2	9*	2	1 suicide
Sub-total	185	177	24	20	98	35	8
International Military Tribunal	24	22	12**	3	4	3	1 suicide 1 severed
Grand Total	209	199	36	23	102	38	10

*In these cases a total of nine defendants were convicted on one or more counts, but were ordered released on the ground that their imprisonment prior to and during their trial was a sufficient punishment.

**Including the fugitive Bormann, who was tried *in absentia*.

Appendix C

COPY No. 26

J. C. S. 1023/10
8 July 1945
Pages 61–77, incl. [original copy]

JOINT CHIEFS OF STAFF

DIRECTIVE ON THE IDENTIFICATION AND APPREHENSION OF PERSONS SUSPECTED OF WAR CRIMES OR OTHER OFFENSES AND TRIAL OF CERTAIN OFFENDERS

References: *a.* J. C. S. Info Memo 146
b. J. C. S. 1067 series
c. J. C. S. 1023 series
d. C. C. S. 705 series

REPORT BY THE JOINT LOGISTICS COMMITTEE

The Problem

1. To submit recommendations, from a military point of view, on the draft directive (Enclosure "B") on the Identification and Apprehension of Persons Suspected of War Crimes or Other Offenses and Trial of Certain Offenders, prepared by the Working Party of the Informal Policy Committee on Germany (IPCOG).

Facts Bearing on the Problem

2. Enclosure "B," a report by the Working Party of IPCOG, is the result of a directive proposed by the U. S. Advisers, European Advisory Commission, circulated as SWNCC 50/D, Enclosure "C" which was referred to the Joint Logistics Committee for recommendation from the military point of view. The Working Party of IPCOG has supplanted the Subcommittee for Europe of the State-War-Navy Coordinating Committee (SWNCC) in this matter.

Conclusion

3. There are no military objections to the revised draft entitled, "Directive on the Identification and Apprehension of Persons Suspected of War Crimes or Other Offenses and Trial of Certain Offenders" (Enclosure "B").

Recommendation

4. That the memorandum in Enclosure "A" be forwarded to the State-War-Navy Coordinating Committee.

Enclosure "A"

DRAFT

MEMORANDUM TO THE STATE-WAR-NAVY COORDINATING COMMITTEE

The Joint Chiefs of Staff have examined the enclosed report (Enclosure "B") by the Working Party of the Informal Policy Committee on Germany and perceive no objections to this report from a military standpoint.

Enclosure "B"

INFORMAL POLICY COMMITTEE ON GERMANY

DIRECTIVE ON THE IDENTIFICATION AND APPREHENSION OF PERSONS SUSPECTED OF WAR CRIMES OR OTHER OFFENSES AND TRIAL OF CERTAIN OFFENDERS

REPORT BY THE WORKING PARTY OF THE INFORMAL POLICY COMMITTEE ON GERMANY

References: *a.* J. C. S. Memo 146
b. SWNCC 50/D

The Problem

1. To consider draft directive on "Apprehension and Detention of War Criminals" (SWNCC 50/D)* prepared by the Planning Committee, U. S. Advisers, European Advisory Commission, and to make recommendations to the Informal Policy Committee on Germany (IPCOG).

Facts Bearing on the Problem

2. The draft directive referred to in paragraph 1 was transmitted by Ambassador Winant to the Department of State and by that Department to the State-War-Navy Coordinating Committee (SWNCC). It was referred to SWNCC Subcommittee for Europe for report and has been further referred to the working party for IPCOG. The working party has representation from the State, Treasury, War and Navy Departments, and Foreign Economic Administration (FEA).

3. Annex 10 to the Moscow Declaration (J. C. S. Memo 146) provides that those German officers and men and members of the Nazi Party who have been responsible for or who have taken consenting part in atrocities, massacres and executions in the occupied countries and Italy will be sent back to the countries in which their crimes were committed to be judged and punished according to the laws of the countries concerned. That declaration is without prejudice to the case against major criminals whose offences have no particular geographical localization. These will be punished by joint decision of the governments of the Allies.

4. This report has been prepared in collaboration with the Joint Logistics Committee, a committee of the Joint Chiefs of Staff.

Discussion

5. It is considered necessary to endeavor to obtain quadrapartite agreement in the European Advisory Commission (EAC) concerning policies to be pursued in Germany with respect to the identification, apprehension and trial of persons suspected of war crimes and similar offenses.

*Enclosure "C".

Conclusion

6. The enclosure to SWNCC 50/D, modified to conform to present U.S. policy in this regard (Annex to Appendix "A") is an adequate expression of U.S. policy to furnish guidance to Ambassador Winant for negotiation in the EAC. However, as quadrapartite control of Germany may be established before such policy is agreed in the EAC and approved by the member governments, a copy of the directive at the Annex to Appendix "A" should be transmitted to the Commander in Chief, U.S. Forces of Occupation in Germany, as an interim directive pending such approval.

Recommendation

7. It is recommended that:

a. After the Joint Chiefs of Staff views have been obtained, IPCOG approve this report, in the event the views of the Joint Chiefs of Staff are not contrary.

b. On approval of the report by IPCOG the memoranda at Appendices "A" and "B" be dispatched.

Appendix "A" to Enclosure "B"

DRAFT

MEMORANDUM TO THE SECRETARY OF STATE

The Informal Policy Committee on Germany has considered the draft directive on "Apprehension and Detention of War Criminals" submitted by Ambassador Winant. There is attached a revised draft entitled "Draft Directive on the Identification and Apprehension of Persons Suspected of War Crimes and Other Offenses and Trial of Certain of Them" approved by the Informal Policy Committee on Germany to which the Joint Chiefs of Staff find no objections from a military viewpoint. It is considered to be an adequate statement of United States policy for negotiation in the European Advisory Commission.

The Joint Chiefs of Staff have been requested to transmit a copy of the revised draft to the Commander in Chief, United States Forces of Occupation in Germany, as an interim directive pending its approval and issuance by the governments represented in the European Advisory Commission.

Annex to Appendix "A" to Enclosure "B"

DRAFT

DIRECTIVE ON THE IDENTIFICATION AND APPREHENSION OF PERSONS SUSPECTED OF WAR CRIMES OR OTHER OFFENSES AND TRIAL OF CERTAIN OFFENDERS

1. This directive is issued to you as Commander in Chief of the U. S. (U. K.), (U. S. S. R.) (French) forces of occupation. As a member of the Control Council, you will urge the adoption by the other occupying powers of the principles and policies set forth in this directive and, pending Control Council agreement, you will follow them in your zone.

2. The crimes covered by this directive are:

a. Atrocities and offenses against persons or property constituting violations of international law, including the laws, rules and customs of land and naval warfare.

b. Initiation of invasions of other countries and of wars of aggression in violation of international laws and treaties.

c. Other atrocities and offenses, including atrocities and persecutions on racial, religious or political grounds, committed since 30 January 1933.

3. The term "criminal" as used herein includes all persons, without regard to their nationality or capacity in which they acted, who have committed any of the crimes referred to in paragraph 2 above, including all persons who (1) have been accessories to the commission of such crimes, (2) have taken a consenting part therein, (3) have been connected with plans or enterprises involving their commission, or (4) have been members of organizations or groups connected with the commission of such crimes. With reference to paragraph 2*b*, the term "criminal" is intended to refer to persons who have held high political, civil or military (including General Staff) positions in Germany or in one of its allies, co-belligerents or satellites or in the financial, industrial or economic life of any of these countries.

4. The Control Council should coordinate policies with respect to the matters covered by this directive.

5. Subject to the coordination of such matters by the Control Council and to its agreed policies:

a. In addition to the persons and classes of persons referred to in paragraph 8 of the Directive to the Commander in Chief of U. S. Forces of Occupation Regarding the Military Government of Germany (J. C. S. 1067/6) or in other instructions, you will take all practicable measures to identify, investigate, apprehend and detain all persons whom you suspect to be criminals as defined in paragraph 3 above and all persons whom the Control Council, any one of the United Nations, or Italy notifies to you as being charged as criminals.

b. You will take under your control pending decision by the Control Council or higher authority as to its eventual disposition, property, real and personal found in your zone and owned or controlled by the persons referred to in subparagraph *a* above.

c. You will report to the Control Council the names of suspected criminals, their places of detention, the charges against them, the results of investigations and the nature of the evidence, the names and locations of witnesses, and the nature of locations of the property so coming under your control.

d. You will take such measures as you deem necessary to insure that witnesses to the crimes covered by this directive will be available when required.

e. You may require the Germans to give you such assistance as you deem necessary.

6. Subject to the coordination of such matters by the Control Council and to its agreed policies:

a. You will promptly comply with a request by any one of the United Nations or Italy for the delivery to it of any person who is stated in such request to be charged with a crime to which this directive is applicable, subject to the following exceptions:

(1) Persons who have held high political, civil or military position in Germany or in one of its allies, co-belligerents, or satellites will not be delivered to any one of the United Nations or Italy, pending consultation with the Control Council to ascertain whether it is desired to try such persons before an international military tribunal. Suspected criminals desired for trial before international military tribunals or persons desired as witnesses at trials before such tribunals will not be turned over to the nation requesting them so long as their presence is desired in connection with such trials.

(2) Persons requested by two or more of the United Nations or one or more of the United Nations and Italy for trial for a crime will not be delivered pending determination by the Control Council of their disposition.

The Control Council should take all practicable measures to insure the availability of such persons to the several United Nations concerned or Italy, in such priority as the Control Council shall determine. If in any case the Control Council fails to make such determination within a reasonable period of time, you will make your own determination based on all the circumstances including the relative seriousness of the respective charges against such person and will deliver the requested person to the United Nations or Italy accordingly.

b. Compliance with any request for the delivery of a person shall not be delayed on the ground that other requests for the same person are anticipated.

c. Delivery of a person to requesting nation shall be subject to the condition that if such person is not brought to trial, tried and convicted within six months from the date he is so delivered, he will be returned to you upon request for trial by any of the other United Nations or Italy.

d. In exceptional cases in which you have a doubt as to whether you should deliver a person demanded under subparagraph *a* above, you should refer the matter for decision to the Control Council with your recommendations.

The Control Council should determine promptly any dispute as to the disposition of any person detained within Germany in accordance with this directive.

7. Appropriate military courts may conduct trials of suspected criminals in your custody. In general these courts should be separate from the courts trying current offenses against your occupation, and, to the greatest practicable extent, should adopt fair, simple and expeditious procedures designed to accomplish substantial justice without technicality. You should proceed with such trials and the execution of sentences except in the following cases:

a. Trials should be deferred of suspected criminals who have held high political, civil or military positions in Germany or in one of its allies, co-belligerents, or satellites, pending consultation with the Control Council to ascertain whether it is desired to try such persons before an international military tribunal.

b. Where charges are pending and the trial has not commenced in your zone against a person also known to you to be wanted elsewhere for trial, the trial in your zone should be deferred for a reasonable period of time, pending consultation with the Control Council as to the disposition of such person for trial.

c. Execution of death sentences should be deferred when you have reason to believe that the testimony of those convicted would be of value in the trial of other criminals in any area whether within or without your zone.

Appendix "B" to Enclosure "B"

DRAFT

MEMORANDUM TO THE JOINT CHIEFS OF STAFF

The Informal Policy Committee on Germany has approved the revised United States draft directive entitled "Draft Directive on the Identification and Apprehension of Persons Suspected of War Crimes and Other Offenses and Trial of Certain of Them" to be transmitted to Ambassador Winant for negotiation in the European Advisory Commission.

It is requested that the Joint Chiefs of Staff transmit a copy of the revised draft directive to the Commander in Chief, United States Forces of Occupation in Germany, as an interim directive pending its approval and issuance by the governments represented on the European Advisory Commission.

Enclosure "C"

21 October 1944

Draft Directive to the US (UK) (USSR) Commander in Chief

APPREHENSION AND DETENTION OF WAR CRIMINALS

1. This directive is issued to you as Commander in Chief of the US (UK) (USSR) forces of occupation. Identical directives are being issued simultaneously to the Commanders in Chief of the forces of occupation of the other two Allies. The three Allied Commanders in Chief, acting jointly, constitute the Supreme Authority.

2. Reference is made to the "Unconditional Surrender of Germany" (J. C. S. Memo 257) and to the pertinent provisions of the General Orders (J. C. S. Memo 291), including those attached as Annex "A".* You will enforce and implement in your zone of occupation and sphere of responsibility the surrender terms and general orders as they relate to the apprehension and detention of war criminals, in accordance with the policies and instructions hereinafter set forth.

3. *a.* As used in this directive, the term "war crimes" includes all offenses against persons or property, whether or not committed under the orders or sanction of governments or commanders, which are violations of the laws and customs of war committed in connection with military operations or occupation, and which outrage common justice or involve moral turpitude.

b. As used in this directive, the term "war criminals" includes all persons, without regard to their nationality or the capacity in which they acted, who have committed war crimes. The term specifically includes persons who have taken a consenting part in war crimes, as, for examples, a superior officer who has failed to take action to prevent a war crime when he had knowledge of its contemplated commission and was in a position to prevent it.

4. For the purposes of this directive, the following dates are established:

a. The war in the Far East began 7 July 1937; and

b. The war in Europe began 1 September 1939, except the war between Germany and Czechoslovakia, which began at an earlier date.

5. Throughout Germany, the Supreme Authority will coordinate and supervise the execution of policies with respect to the identification, investigation, apprehension, detention and disposition of suspected war criminals.

6. The Supreme Authority will determine the disposition of all persons detained within Germany as suspected war criminals or as witnesses in connection with the commission of war crimes. When any such person is wanted by a single United Nation in connection with an alleged war crime committed against it or its nationals, the Supreme Authority is authorized to direct the delivery of such person to such United Nation, reserving the right to recall such person for trial on further charges of war crimes or for the purpose of testifying at such a trial. When any such person is wanted by two or more United Nations for either of the above purposes, the Supreme Authority will take all practicable measures to insure the availability of such person to the several United Nations involved, in such priority as the Supreme Authority shall determine.

7. Within your zone and sphere, you will take all practicable measures to accomplish the identification, investigation, apprehension and detention of all persons whom you, acting on your own initiative, consider to be war criminals, and of all persons whom the Supreme Authority notifies to you as suspected war criminals, whether by name, position, category or any other form of description.

8. Within your zone, you are authorized to hold the German authorities re-

*See Appendix "A".

sponsible for the identification, investigation, apprehension and delivery into your control, of all persons covered by the provisions of paragraph 7 of this directive.

9. Within your zone, you will require the German authorities to furnish you all information and documents, and to procure, detain and protect all witnesses, required for the identification, investigation or trial of persons charged with war crimes.

10. Within your zone, you will impound or sequester, and hold subject to the disposition of the Supreme Authority, all property, movable or immovable, owned by, or under the control of, all persons charged with war crimes. You will report to the Supreme Authority the location and general nature of such property.

11. You will report to the Supreme Authority the names of all persons apprehended and detained in custody within your zone as suspected war criminals or as witnesses in connection with the commission of war crimes. You will include in your report a statement of the alleged war crimes and of the general nature of the evidence relating to the charges.

12. Notwithstanding any of the foregoing provisions of this directive, you are authorized to try immediately by tribunals established under your authority the following:

a. Violations of the laws and customs of war which involve the security or the successful carrying out of military operations or occupation under your direction; and

b. All violations of the orders and enactments promulgated by your military government.

Appendix "A" to Enclosure "C"

GENERAL ORDER NO. 2

Political

(Extract from pages 14 and 15 of J. C. S. Info Memo 291)

* * * * * * *

Article No. 7: War Criminals.

13 *a.* Adolf Hitler and his Chief associates, and all persons suspected of having committed, ordered or abetted war crimes or analogous offenses, whom the Allied Representatives may designate either by name or by the rank, office or employment which they held in the German armed forces, the German Government, or other German organizations or agencies at the time of the alleged crime, will forthwith be apprehended and surrendered into the hands of the Allied Representatives by the German authorities.

b. The same shall apply in the case of any national of any of the United Nations who is alleged to have committed offenses against his national law and whose name or designation appears on lists to be communicated to the German authorities.

14. The primary responsibility for arresting and surrendering and for preventing the flight, escape or concealment of the persons mentioned in paragraphs "*a*" and "*b*" above will rest with the German authorities, without prejudice, however, to the right of the Allied Representatives themselves to take such steps in this regard as they may judge necessary. The German authorities will comply with any instructions given by the Allied Representatives for these purposes, and will take all measures and afford all information and facilities calculated to lead to the arrest and surrender of those concerned.

15 *a.* The German authorities will furnish any information and documents, and will secure the attendance of any witnesses required for the trial of those concerned, and will in general give all other aid and assistance for this purpose.

b. The German authorities will comply with any directions given in regard to the property of those concerned, such as its seizure, custody or surrender.

* * * * * * *

Appendix "B" to Enclosure "C"

MEMORANDUM FROM THE ASSISTANT MILITARY ADVISER TO AMBASSADOR WINANT

"The attached paper (Enclosure) is a proposed policy agreement among the U. S., U. K. and Soviet Governments on a subject considered applicable to all of Germany after surrender. It has been prepared in London by the Planning Committee, U. S. Advisers, European Advisory Commission, and has been approved by Ambassador Winant's political, military, naval, and military air advisers.

The draft directive is based on the following assumptions:

a. That some form of tripartite control machinery for Germany will be established immediately upon surrender.

b. That such control machinery will be responsible for carrying out matters applicable to all of Germany in accordance with tripartite policy agreements concluded by the U. S., U. K., and Soviet Governments.

The U. S. and British delegations on the European Advisory Commission are drafting proposed tripartite policy agreements on approximately thirty subjects. In view of the fact that such policy agreements would be furnished to the three Allied Commanders in Chief by their respective Governments in the form of directives, the U. S. and British delegations are drafting their papers in that form.

The Soviet delegation has not yet indicated that they are preparing such directives.

The attached draft directive has been transmitted by Ambassador Winant to the State Department for comment by the appropriate government agencies.

Ambassador Winant contemplates ultimately submitting the U. S. views on this subject to the European Advisory Commission."

Appendix D

CONTROL COUNCIL

Law No. 10

Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity

In order to give effect to the terms of the Moscow Declaration of 30 October 1943 and the London Agreement of 8 August 1945, and the Charter issued pursuant thereto and in order to establish a uniform legal basis in Germany for the prosecution of war criminals and other similar offenders, other than those dealt with by the International Military Tribunal, the Control Council enacts as follows:

Article I

The Moscow Declaration of 30 October 1943 "Concerning Responsibility of Hitlerites for Committed Atrocities" and the London Agreement of 8 August 1945 "Concerning Prosecution and Punishment of Major War Criminals of the European Axis" are made integral parts of this Law. Adherence to the provisions of the London Agreement by any of the United Nations, as provided for in Article V of that Agreement, shall not entitle such Nation to participate or interfere in the operation of this Law within the Control Council area of authority in Germany.

Article II

1. Each of the following acts is recognized as a crime:

(*a*) *Crimes against Peace.* Initiation of invasions of other countries and wars of aggression in violation of international laws and treaties, including but not limited to planning, preparation, initiation or waging a war of aggression, or a war of violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.

(*b*) *War Crimes.* Atrocities or offenses against persons or property constituting violations of the laws or customs of war, including but not limited to, murder, ill treatment or deportation to slave labour or for any other purpose, of civilian population from occupied territory, murder or ill treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity.

(*c*) *Crimes against Humanity.* Atrocities and offenses, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population, or persecutions on political, racial or religious grounds whether or not in violation of the domestic laws of the country where perpetrated.

(*d*) Membership in categories of a criminal group or organization declared criminal by the International Military Tribunal.

2. Any person without regard to nationality or the capacity in which he acted, is deemed to have committed a crime as defined in paragraph 1 of this Article, if he was (a) a principal or (b) was an accessory to the commission of any such crime or ordered or abetted the same or (c) took a consenting part therein or (d) was connected with plans or enterprises involving its commission or (e) was a member of any organization or group connected with the commission of any such crime or (f) with reference to paragraph 1 (*a*) if he held a high political, civil or military (including General Staff) position in Germany or in one of its Allies, co-belligerents or satellites or held high position in the financial, industrial or economic life of any such country.

3. Any persons found guilty of any of the crimes above mentioned may upon conviction be punished as shall be determined by the tribunal to be just. Such punishment may consist of one or more of the following:

(*a*) Death.

(*b*) Imprisonment for life or a term of years, with or without hard labor.

(*c*) Fine, and imprisonment with or without hard labour, in lieu thereof.

(*d*) Forfeiture of property.

(*e*) Restitution of property wrongfully acquired.

(*f*) Deprivation of some or all civil rights.

Any property declared to be forfeited or the restitution of which is ordered by the Tribunal shall be delivered to the Control Council for Germany, which shall decide on its disposal.

4. (*a*) The official position of any person, whether as Head of State or as a responsible official in a Government Department, does not free him from responsibility for a crime or entitle him to mitigation of punishment.

(*b*) The fact that any person acted pursuant to the order of his Government or of a superior does not free him from responsibility for a crime, but may be considered in mitigation.

5. In any trial or prosecution for a crime herein referred to, the accused shall not be entitled to the benefits of any statute of limitation in respect to the period from 30 January 1933 to 1 July 1945, nor shall any immunity, pardon or amnesty granted under the Nazi regime be admitted as a bar to trial or punishment.

Article III

1. Each occupying authority, within its Zone of Occupation,

(*a*) shall have the right to cause persons within such Zone suspected of having committed a crime, including those charged with crime by one of the United Nations, to be arrested and shall take under control the property, real and personal, owned or controlled by the said persons, pending decisions as to its eventual disposition.

(*b*) shall report to the Legal Directorate the name of all suspected criminals, the reasons for and the places of their detention, if they are detained, and the names and location of witnesses.

(*c*) shall take appropriate measures to see that witnesses and evidence will be available when required.

(*d*) shall have the right to cause all persons so arrested and charged, and not delivered to another authority as herein provided, or released, to be brought to trial before an appropriate tribunal. Such tribunal may, in the case of crimes committed by persons of German citizenship or nationality against other persons of German citizenship or nationality, or stateless persons, be a German Court, if authorized by the occupying authorities.

2. The tribunal by which persons charged with offenses hereunder shall be tried and the rules and procedure thereof shall be determined or designated by each Zone Commander for his respective Zone. Nothing herein is intended to, or

shall impair or limit the jurisdiction or power of any court or tribunal now or hereafter established in any Zone by the Commander thereof, or of the International Military Tribunal established by the London Agreement of 8 August 1945.

3. Persons wanted for trial by an International Military Tribunal will not be tried without the consent of the Committee of Chief Prosecutors. Each Zone Commander will deliver such persons who are within his Zone to that committee upon request and will make witnesses and evidence available to it.

4. Persons known to be wanted for trial in another Zone or outside Germany will not be tried prior to decision under Article IV unless the fact of their apprehension has been reported in accordance with Section 1 (*b*) of this Article, three months have elapsed thereafter, and no request for delivery of the type contemplated by Article IV has been received by the Zone Commander concerned.

5. The execution of death sentences may be deferred by not to exceed one month after the sentence has become final when the Zone Commander concerned has reason to believe that the testimony of those under sentence would be of value in the investigation and trial of crimes within or without his zone.

6. Each Zone Commander will cause such effect to be given to the judgments of courts of competent jurisdiction, with respect to the property taken under his control pursuant thereto, as he may deem proper in the interest of justice.

Article IV

1. When any person in a Zone in Germany is alleged to have committed a crime, as defined in Article II, in a country other than Germany or in another Zone, the government of that nation or the Commander of the latter Zone, as the case may be, may request the Commander of the Zone which the person is located for his arrest and delivery for trial to the country or Zone in which the crime was committed. Such request for delivery shall be granted by the Commander receiving it unless he believes such person is wanted for trial or as a witness by an International Military Tribunal, or in Germany, or in a nation other than the one making the request, or the Commander is not satisfied that delivery should be made, in any of which cases he shall have the right to forward the said request to the Legal Directorate of the Allied Control Authority. A similar procedure shall apply to witnesses, material exhibits and other forms of evidence.

2. The Legal Directorate shall consider all requests referred to it, and shall determine the same in accordance with the following principles, its determination to be communicated to the Zone Commander.

(*a*) A person wanted for trial or as a witness by an International Military Tribunal shall not be delivered for trial or required to give evidence outside Germany, as the case may be, except upon approval by the Committee of Chief Prosecutors acting under the London Agreement of 8 August 1945.

(*b*) A person wanted for trial by several authorities (other than an International Military Tribunal) shall be disposed of in accordance with the following priorities:

(1) If wanted for trial in the Zone [in] which he is, he should not be delivered unless arrangements are made for his return after trial elsewhere;

(2) If wanted for trial in a Zone other than that in which he is, he should be delivered to that Zone in preference to delivery outside Germany unless arrangements are made for his return to that Zone after trial elsewhere;

(3) If wanted for trial outside Germany by two or more of the United Nations, of one of which he is a citizen, that one should have priority;

(4) If wanted for trial outside Germany by several countries, not all of which are United Nations, United Nations should have priority;

(5) If wanted for trial outside Germany by two or more of the United Nations, then, subject to Article IV 2 (*b*) (3) above, that which has the most serious charges against him, which are moreover supported by evidence, should have priority.

Article V

The delivery, under Article IV of this law, of persons for trial shall be made on demands of the Governments or Zone Commanders in such a manner that the delivery of criminals to one jurisdiction will not become the means of defeating or unnecessarily delaying the carrying out of justice in another place. If within six months the delivered person has not been convicted by the Court of the Zone or country to which he has been delivered, then such person shall be returned upon demand of the Commander of the Zone where the person was located prior to delivery.

Done at Berlin, 20 December 1945.

(Signed) Joseph T. McNarney
JOSEPH T. McNARNEY
General, U. S. Army

(Signed) Bernard L. Montgomery
BERNARD L. MONTGOMERY
Field Marshall

(Signed) Louis Koeltz, General d'Corps de Armee
for PEIRRE KOENIG
General d'Armee

(Signed) Georgi Zhukov
GEORGI ZHUKOV
Marshall of the Soviet Union

Appendix E

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SPECIAL ARMY ORDER

THE WAR OFFICE,
18th June, 1945.

ROYAL WARRANT

0160/2498 A. O. 81/1945

Regulations for the Trial of War Criminals

GEORGE R. I.

WHEREAS WE deem it expedient to make provision for the trial and punishment of violations of the laws and usages of war committed during any war in which WE have been or may be engaged at any time after the second day of September, nineteen hundred and thirty-nine;

OUR WILL AND PLEASURE IS that the custody, trial and punishment of persons charged with such violation of the laws and usages of war as aforesaid shall be governed by the Regulations attached to this Our Warrant.

Given at Our Court at St. James's, this 14th day of June, 1945, in the 9th year of our Reign.

By His Majesty's Command,

P. J. GRIGG.

Regulations for the Trial of War Criminals

1. In these Regulations if not inconsistent with the context and subject to any express provision to the contrary the following expressions have the following meanings namely:—

"War Crime" means a violation of the laws and usages of war committed during any war in which His Majesty has been or may be engaged at any time since the 2nd September, 1939. Any expression used in these Regulations has the same meaning as in the Army Act or the Rules of Procedure made pursuant thereto. "Military Court" means a Military Court constituted and held under these Regulations.

2. (*a*) The following officers shall have power to convene Military Courts for the trial of persons charged with having committed war crimes and to confirm the findings and sentences of such Courts namely:—

(i) Any officers authorized so to do by His Majesty and His Warrant.
(ii) Any officers authorized so to do by delegation under the Warrant of any officer referred to under (i) above whom His Majesty has authorized to make such delegation by His Warrant.

(*b*) Any such Warrants may be addressed to an officer by name or by designation of an office and may be subject to such restrictions, reservations, exceptions,

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and conditions as may seem meet to His Majesty or any such delegating officer as aforesaid.

(c) An officer having authority to confirm the finding and sentence of a Military Court may reserve confirmation of the finding and sentence or of the sentence to any superior authority competent to confirm the findings and sentences of the like kind of military court convened under these Regulations.

3. Except in so far as herein otherwise provided expressly or by implication the provisions of the Army Act and the Rules of Procedure made pursuant thereto so far as they relate to Field General Courts-Martial and to any matters preliminary or incidental thereto or consequential thereon shall apply so far as applicable to Military Courts under these Regulations and any matters preliminary or incidental thereto or consequential thereon in like manner as if the Military Courts were Field General Courts-Martial and the accused were persons subject to military law charged with having committed offences on active service.

Sections 49, 51, 54 (1) (*d*) and (7) and 57 (2) and (4) and 57 (A) of the Army Act, and Rules of Procedure 3, 34, 35 (D) [Army Order 127, 1945], 52 (B) [Army Order 108, 1947], 56, 63 (C) [Army Order 108, 1947], 110, 118 (A) and (B), 63 (E) [Army Order 108, 1947] and 120 (C), (D) and (E) made pursuant thereto shall not apply.

Notwithstanding the provisions of Rule of Procedure 63 (E) a Court may, after his arraignment, proceed with the trial of an accused in his absence, if satisfied that so doing involves no injustice to such accused. [Army Order 8, 1946]

4. If it appears to an officer authorized under the Regulations to convene a Military Court that a person then within the limits of his command has, at any place whether within or without such limits, committed a war crime he may direct that such person if not already in military custody shall be taken into and kept in such custody pending trial in such manner and in the charge of such military unit as he may direct. The commanding officer of the unit having charge of the accused shall be deemed to be the commanding officer of the accused for the purposes of all matters preliminary and relating to trial and punishments. But such commanding officer shall have no power to dismiss the charge or deal with the accused summarily for a war crime. He shall without any such preliminary hearing as is referred to in Rule of Procedure 3 either cause a Summary of Evidence to be taken in accordance with Rule of Procedure 4 or an abstract of evidence to be prepared as the Convening Officer may direct. The accused shall not have the right of having a Summary taken or of demanding that the evidence at the Summary shall be taken on oath or that any witness shall attend for cross-examination at the taking of the Summary.

5. A Military Court shall consist of not less than two officers in addition to the President, who shall be appointed by name, but no officer, whether sitting as President or as a member, need have held his commission for any special length of time. If the accused is an officer of the naval, military or air force of an enemy or ex-enemy Power the Convening Officer should, so far as practicable, but shall be under no obligation so to do, appoint or detail as many officers as possible of equal or superior relative rank to the accused. If the accused belongs to the naval or air force of an enemy or ex-enemy Power the Convening Officer should appoint or detail, if available, at least one naval officer or one air force officer as a member of the Court, as the case may be.

In default of a person deputed by H. M. Judge Advocate General to act as Judge Advocate, the Convening Officer may by order appoint a fit person to act as Judge Advocate at the trial. If no such Judge Advocate is deputed or appointed, the Convening Officer should appoint at least one officer having one of the legal qualifications mentioned in Rule of Procedure 93 (B) as President or as a member of the Court, unless, in his opinion, such opinion to be expressed in the Order convening the Court and to be conclusive, no such officer is necessary [Army Order 24, 1946]

Notwithstanding anything in these Regulations the Convening Officer may, in a case where he considers it desirable so to do, appoint as a member of the Court, but not as President, one or more officers of an Allied Force serving under his command or placed at his disposal for the purpose, provided that the number of such officers so appointed shall not comprise more than half the members of the Court, excluding the President.

6. The accused shall not be entitled to object to the President or any member of the Court or the Judge Advocate or to offer any special plea to the jurisdiction of the Court.

7. Counsel may appear on behalf of the Prosecutor and accused in like manner as if the Military Court were a General Court-Martial, and Rules of Procedure 88–93 shall in such cases apply accordingly.

In addition to the persons deemed to be properly qualified as Counsel under Rule of Procedure 93 any person qualified to appear before the Courts of the Country of the accused and any person approved by the Convening Officer of the Court shall be deemed to be properly qualified as Counsel for the Defence.

8. (i) At any hearing before a Military Court convened under these Regulations the Court may take into consideration any oral statement or any document appearing on the face of it to be authentic, provided the statement or document appears to the Court to be of assistance in proving or disproving the charge, notwithstanding that such statement or document would not be admissible as evidence in proceedings before a Field General Court-Martial, and without prejudice to the generality of the foregoing in particular:—

(*a*) If any witness is dead or is unable to attend or to give evidence or is, in the opinion of the Court, unable so to attend without undue delay, the Court may receive secondary evidence of statements made by or attributable to such witness;

(*b*) any document purporting to have been signed or issued officially by any member of any Allied or enemy force or by any official or agency of any Allied, neutral or enemy government, shall be admissible as evidence without proof of the issue or signature thereof;

(*c*) the Court may receive as evidence of the facts therein stated any report of the "Comite International de la Croix Rouge" or by any representative thereof, by any member of the medical profession or of any medical service, by any person acting as a "man of confidence" (homme de confiance), or by any other person whom the Court may consider was acting in the course of his duty when making the report;

(*d*) the Court may receive as evidence of the facts therein stated any depositions or any record of any military Court of Inquiry or (any Summary) of any examination made by any officer detailed for the purpose by any military authority;

(*e*) the Court may receive as evidence of the facts therein stated any diary, letter or other document appearing to contain information relating to the charge;

(*f*) if any original document cannot be produced or, in the opinion of the Court, cannot be produced without undue delay, a copy of such document or other secondary evidence of its contents may be received in evidence;

It shall be the duty of the Court to judge of the weight to be attached to any evidence given in pursuance of this Regulation which would not otherwise be admissible.

(ii) Where there is evidence that a war crime has been the result of concerted action upon the part of a unit or group of men, then evidence given upon any charge relating to that crime against any member of such unit or group may be received as *prima facie* evidence of the responsibility of each member of that unit or group for that crime.

In any such case all or any members of any such unit or group may be charged and tried jointly in respect of any such war crime and no application by any of them to be tried separately shall be allowed by the Court [Army Order 127, 1945].

(iii) The Court shall take judicial notice of the laws and usages of war.

(iv) Unless the Convening Officer otherwise directs a finding of guilty and the sentence shall be announced in Open Court by the President, who shall at the same time state that such finding and sentence are subject to confirmation. If such announcement is not made in Open Court the President shall notify the accused of the finding and sentence under sealed cover at the termination of the Proceedings and record in the Proceedings that this has been done. A finding of acquittal, whether on all or some of the offences with which the accused is charged, shall not require confirmation or be subject to be revised and shall be pronounced at once in Open Court, but the Court shall not thereupon release the accused, unless otherwise entitled to be released.

(v) The sittings of Military Courts will ordinarily be open to the public so far as accommodation permits. But the Court may, on the ground that it is expedient so to do in the national interest or in the interests of justice, or for the effective prosecution of war crimes generally, or otherwise, by order prohibit the publication of any evidence to be given or of any statement to be made in the course of the proceedings before it, or direct that all or any portion

of the public shall be excluded during any part of such proceedings as normally take place in Open Court, except during the announcement of the finding and sentence pursuant to paragraph (iv) above.

(vi) A record shall be made of the Proceedings of every Military Court.

9. A person found guilty by a Military Court of a war crime may be sentenced to and shall be liable to suffer any one or more of the following punishments, namely:—

(i) Death (either by hanging or by shooting);
(ii) Imprisonment for life or for any less term;
(iii) Confiscation;
(iv) A fine.

In a case where the war crime consists wholly or partly of the taking, distribution or destruction of money or other property the Court may as part of the sentence order the restitution of such money or other property and in default of complete restitution award a penalty equal in value to that which has been so taken, distributed or destroyed or not restored.

Sentence of death shall not be passed on any person by a Military Court without the concurrence of all those serving on the Court if the Court consists of not more than three members, including the President, or without the concurrence of at least two-thirds of those serving on the Court if the Court consists of more than three members, including the President.

10. The accused may within 14 days of the termination of the Proceedings in Court submit a Petition to the Confirming Officer against the finding or sentence or both provided that he gives notice to the Confirming Officer within 48 hours of such termination of his intention to submit such a Petition. The accused shall have no right to submit any Petition otherwise than as aforesaid.

Provided that if such Petition is against the finding it shall be referred by the Confirming Officer, together with the Proceedings of the trial, to His Majesty's Judge Advocate General or to any Deputy of his approved by him for that purpose in the Command overseas where the trial took place for advice and report thereon.

11. The finding and any sentence which the Court had jurisdiction to pass may be confirmed and, if confirmed, shall be valid, notwithstanding any deviation from these Regulations, or the Rules of Procedure or any defect or objection, technical or other, unless it appears that a substantial miscarriage of justice has actually occurred.

12. When a sentence passed by a Military Court has been confirmed, the following authorities shall have power to mitigate or remit the punishment thereby awarded or to commute such punishment for any less punishment or punishments to which the offender might have been sentenced by the said Court; that is to say:

(i) The secretary of State for War or any officer not below the rank of Major-General authorized by him; and

(ii) Where so agreed between the said Secretary of State for War and the Secretary of State for Foreign Affairs (a) the Secretary of State for Foreign Affairs, or (b) where an offender convicted by a military court is undergoing sentence in the British Zone of Germany, or in the British Zone of Austria, the High Commissioner in Germany or in Austria (as the case may be) designated by His Majesty's Government, if authorized by the Secretary of State for Foreign Affairs, or any other person, so authorized, who may, for the time being, be discharging the functions of the High Commissioner as aforesaid. [Army Order 116, 1949]

13. In any case not provided for in these Regulations such course will be adopted as appears best calculated to do justice.

By Command of the Army Council,
[Signature Illegible]

LONDON

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Appendix F

Description

Annex

1. Letter Chief of Staff to U. S. Chief of Counsel 1 December 1945, with memorandum of plan and Annex "A" thereto.
2. Letter U. S. Chief of Counsel to Chief of Staff 4 December 1945.
3. Letter U. S. Chief of Counsel to the President 4 December 1945.
4. Letter Chief of Staff to U. S. Chief of Counsel 5 December 1945.
5. Letter Commanding General to Chief of Staff, Washington, 5 December 1945.
6. Draft Executive Order.

Annex 1

HEADQUARTERS

UNITED STATES FORCES
EUROPEAN THEATER

Office of The Chief of Staff

1 December 1945

The United States Chief of Counsel
for Prosecution of Axis Criminality,
APO 403, U. S. Army.

MY DEAR MR. JUSTICE JACKSON,

This letter is the result of discussions which have been had during the past few weeks between Mr. Fahy and General Betts, in consultation from time to time with yourself, concerning the proceedings against war criminals in this theater in addition to the present trial before the International Military Tribunal. The purpose of these discussions has been to work out the most effective method for organizing such further prosecutions and thus for meeting the Theater Commander's responsibility in this regard.

In the organization of this effort it seems that two basic principles should be observed:

1. The Office of the United States Chief of Counsel should continue in existence beyond the present trial, and take control and general responsibility for all further war crimes proceedings against the leaders of the Axis powers and their principal agents and accessories, as well as against members of the groups and organizations declared criminal. The Office of the Chief of Counsel has many of the physical facilities and much of the information necessary to continue this work, and on all counts seems best fitted to do so. To set up a new organization in this theater to handle further proceedings against war criminals would waste energy and retard our efforts.

2. The detection and punishment of such war criminals, major as well as minor, consistently with the London Agreement of 8 August 1945, is an enterprise which is closely related to and indeed a part of the occupational program. The prosecution of these war criminals beyond the trial now pending, and their

punishment, should be carried out in accord with the policies and under the general supervision of the occupational authorities. This is true whether further proceedings are conducted in zonal occupational courts or on an international basis before an International Tribunal.

In the light of these considerations there has been evolved a "Memorandum of Plan for further Prosecution of War Criminals," of which a copy is attached. This plan expresses the considered views of this headquarters. Your agreement and assistance are, however, essential to its adoption. It is proposed that, if you concur, steps be taken by yourself and by the Theater Commander, in concert, to procure the necessary amendment of Executive Order No. 9547 and bring the plan into execution.

Your own thoughts and energies are necessarily concentrated upon the present trial in the International Military Tribunal. Needless to say, nothing must be done to embarrass that effort. However, it seems most inadvisable to let the organization of further prosecutions await the end of the present proceeding, which may be months in the future. Hence this request for your counsel and cooperation.

Please be assured of the appreciation of this headquarters of your unfailing consideration. You have never been too busy with your own problems to lend your experience and counsel. If with your approval the present proposal is put into operation, the authorities of the United States Forces and of the Office of Military Government will lend every effort to its successful execution.

For the THEATER COMMANDER:

[Signed] W. B. Smith
W. B. SMITH,
Lieutenant General, U.S.A.,
Chief of Staff.

MEMORANDUM OF PLAN FOR FURTHER PROSECUTION OF WAR CRIMINALS

1. The scope of this memorandum extends to war criminals as follows:

a. Such of the leaders of the European Axis powers and their principal agents and accessories as are not under indictment before the International Military Tribunal in the trial now in process, and

b. Members of groups or organizations declared criminal by the International Military Tribunal.

2. The United States Chief of Counsel will immediately appoint within his staff a Deputy charged with the responsibility for organizing and planning for the prosecution of the foregoing.

3. Amendment of Executive Order No. 9547 will be sought by the United States Chief of Counsel and by the Theater Commander, as indicated in Annex "A" hereto.

4. The United States Chief of Counsel will now designate Colonel Telford Taylor his Deputy for the purpose indicated in paragraph 2 above, with the understanding that upon the Office of the United States Chief of Counsel coming under the Office of Military Government for Germany (U. S.) Colonel Taylor will be designated Chief of Counsel for War Crimes.

5. Without awaiting the termination of the present trial, the Deputy will go forward with all proper measures for executing his responsibilities. However, nothing shall be done to disturb the trial organization with which the Chief of Counsel is carrying on the prosecution of the present case.

6. The Chief of Counsel, when his office comes under the Office of Military Governor for Germany (U. S.), will clear directly with the Deputy Military Governor. He will work in close liaison with the Legal Adviser of the Office of Military Government for Germany (U. S.) and with the Theater Judge Advocate.

7. The full cooperation of the United States Forces and of the Office of Military Government for Germany (U. S.) will be available to the Chief of Counsel.

8. Announcement of the foregoing should be made in the earliest possible future, so that proper steps may be taken to preserve records and documents in usable form, retain suitable personnel so far as they may be available, make necessary physical arrangements, and in general maintain the momentum of the existing organization.

Annex "A"

EXECUTIVE ORDER NO.

1. Paragraph 1 of Executive Order No. 9547 of May 2, 1945, is hereby amended to read as follows:

1. Associate Justice Robert H. Jackson is hereby designated to act as the Representative of the United States and as its Chief of Counsel in preparing and prosecuting charges of atrocities and war crimes against such of the leaders of the European Axis powers and their principal agents and accessories as the United States may agree with any of the United Nations to bring to trial before an international military tribunal. The Chief of Counsel is further authorized to proceed before United States military or occupation tribunals, in proper cases, against other Axis adherents, including but not limited to cases against members of groups and organizations declared criminal by said international military tribunal. He shall serve without additional compensation but shall receive such allowance for expenses as may be authorized by the President.

2. Upon the termination of the appointment of Associate Justice Robert H. Jackson as Representative of the United States and its Chief of Counsel, the functions, duties and powers specified in Executive Order No. 9547 of May 2, 1945, shall be vested in a Chief of Counsel for War Crimes to be appointed by the United States Military Governor for Germany or his successor.

Annex 2

OFFICE OF U. S. CHIEF OF COUNSEL

APO 403, U.S. ARMY

4 December 1945

Lieutenant General W. B. Smith,
Chief of Staff,
United States Forces, European Theater,
APO 757, U.S. Army.

My dear General Smith:

I am in agreement with your letter of December 1, 1945, as to the immediate need for fixing responsibility for conducting proceedings against Axis criminals additional to the pending Nuernberg trial, and with your plan for meeting that need.

From the protracted study which has been made of the matter, the conclusion has emerged clearly that the Office of the Chief of Counsel should be continued

for the prosecution by the United States of such further cases as may be brought against the leaders of the Axis powers and their principal agents and accessories, as well as against members of such of the groups and organizations as may be declared criminal. It seems certain that any new organization would compete with the present one for personnel, services, and priorities. There would be the possibility of actual conflict in policy and in the treatment of cases. The creation of a new office, too, would be likely to produce some public confusion. Finally, the present organization is functioning smoothly, has developed teamwork and an esprit de corps, and so offers much the best hope of retaining valuable personnel.

I must not, myself, assume new responsibilities. The time fast approaches when I must return to singleminded attention to the work of the Supreme Court.

Accordingly I am entirely in agreement with the proposal that I designate a member of my staff to organize and plan the prosecution of further cases, and that upon my release from my responsibilities under Executive Order No. 9547 the Office of the Chief of Counsel pass under the United States Military Government for Germany. I am also fully in accord with the proposal that Colonel Telford Taylor be designated as the one who should be charged with such organization and planning, subject to the discharge of his responsibilities in the present proceeding, and that he become head of the organization, by appointment of the Military Governor, when my appointment shall have terminated.

In order that his position and responsibility may be made more clear, I think that your recommended draft of a new Executive Order should be amended by inserting, between the two proposed paragraphs, an additional paragraph as follows:

> 2. The present Chief of Counsel is authorized to designate a Deputy to whom he may assign responsibility for organizing and planning the prosecution of further charges of atrocities and war crimes, other than the indictment now being tried as case No. 1 in the international military tribunal, and, as he may be directed by the Chief of Counsel, for conducting such further prosecutions.

With this single addition, not merely do I concur in your solution of the difficult problem of further prosecutions, but I think it is now the only course which affords the promise of continuous and effective action.

You suggest that steps be taken, by the Theater Commander and myself in concert, to procure the desired amendment to Executive Order No. 9547 and otherwise to bring the plan into operation. Accordingly, I am writing a letter to the President, presenting from my point of view the reasons why the proposed Executive Order should be issued.

Your expression of the good understanding which has marked the relations of the Office of the Chief of Counsel and the higher military authorities in this theater is acknowledged and reciprocated. I note, too, your assurance of all the support that Colonel Taylor will need. Certainly the task he is to assume is a heavy one, in which the ready and effective cooperation of the army and of the military government are essential to success.

Sincerely yours,

[Signed] Robert H. Jackson,
ROBERT H. JACKSON,
Chief of Counsel for the
United States.

Annex 3

OFFICE OF U. S. CHIEF OF COUNSEL

APO 403, U. S. ARMY

4 December 1945

The President
The White House
Washington, D. C.

My Dear Mr. President:

The problem of the further prosecution of war crimes, beyond what is now in motion in this theater, has been the subject of continued study by members of the Theater Commander's staff, and of constant consultation between that headquarters and myself. There has now emerged a plan as to what we believe should be done, and an agreement that the Theater Commander and I should act in concert to bring it into operation.

It appears that the War Department, by directive JCS 1023/10, has instructed the Theater Commander to cause the following crimes to be punished, by quadripartite action so far as possible and otherwise by action within the United States Zone:

(*a*) Atrocities and offenses against persons or property constituting violations of international law, including the laws, rules and customs of land and naval warfare;

(*b*) Initiation of invasions of other countries and of wars of aggression in violation of international laws and treaties; and

(*c*) Other atrocities and offenses, including atrocities and persecutions on racial, religious or political grounds, committed since 30 January 1933.

This is, obviously, a very large order, especially as to category "(*c*)" above.

I am informed that, prior to the receipt of the above directive, the Theater Commander had established a War Crimes Branch in the office of the Theater Judge Advocate, whose mission is limited to investigating and preparing for trial cases of (1) violations of the laws of war to the prejudice of United States nationals, notably prisoners of war, and (2) atrocities committed in the concentration camps uncovered by the United States Forces. These cases are continually being brought to trial before either military commissions or military government courts.

The efforts of my own office have been directed toward the prosecution of the one big case now before the International Military Tribunal.

How best to organize the prosecution of further cases, consistently with the functions of the United States Chief of Counsel under Executive Order No. 9547, has, as I say, been the subject of conference between representatives of the Theater Commander and myself. After protracted examination of all alternatives, the conclusion has appeared inescapable that by far the best prospect for effective action lies in a continuation of the Office of the Chief of Counsel, enlarging its scope of action so that prosecution may be brought in zonal courts as well as before an international military tribunal, and providing that upon the termination of my service as Chief of Counsel the functions, duties and powers of that office shall pass to a Chief of Counsel for War Crimes to be appointed within the Office of Military Government for Germany (U. S.).

There are a number of reasons why, it is believed, the office of the Chief of Counsel for War Crimes should be within the military government structure. The integral nature of the war crimes problem has become apparent in the examination of the responsibilities imposed upon the Theater Commander in relation to my own field of action. The treatment of war criminals, including the so-called "membership cases," is a part of the entire operation of governing Germany, and would appropriately become a task of the occupational machinery. Moreover, it has been a matter of constant experience that an independent office, such as mine now is, must draw upon the occupational authorities for a variety of services, and in this respect the situation would, I am sure, be facilitated by bringing the United States prosecutor directly under the military government.

The outline of the plan worked out between the Theater Headquarters and the Office of Military Government, in which I fully concur, will be found in the papers attached hereto, to which your attention is invited.

One matter which involves action at Washington is the proposed Executive Order in three paragraphs, expanding the functions of the Chief of Counsel, authorizing me to designate a deputy to prepare for further prosecutions, and providing that upon my withdrawal the office shall come under the Office of Military Government. I recommend this proposal to your favorable consideration.

I am proceeding at this time to place Colonel Telford Taylor, of my staff, in charge of a new section whose function it will be to organize and plan for further prosecutions—before another international military tribunal, or in zonal courts, or in both, as developments may dictate. Upon the promulgation of the desired Executive Order I would designate Colonel Taylor as my deputy for further prosecutions. The Theater Headquarters and the Office of Military Government for Germany intend that, upon my withdrawal, Colonel Taylor would be named Chief of Counsel for War Crimes by the Military Governor and would then go forward with the prosecutions on which he would already have been engaged.

This seems to me a most desirable outcome. Undoubtedly the Office of Chief of Counsel, with its staff, its documents, and its established course of operation, has a going-concern value which it would be disastrous to lose. Colonel Taylor is intimately acquainted with the work of the office. His professional experience before coming to this assignment, and his intimate acquaintance with the prosecution of war crimes, make him preeminently qualified to carry on the work. Accordingly I earnestly hope that the contemplated arrangement may be carried into execution.

I cannot emphasize too strongly the proportions of the problem that lies ahead, or the importance of settling without delay upon the organization for further prosecutions. Competent personnel will be one critical need, and our existing assets in that respect will constantly be wasting if we cannot promptly decide upon the organization for doing what remains to be done.

Respectfully yours,

[Signed] Robert H. Jackson
ROBERT H. JACKSON
Chief of Counsel for the
United States

Annex 4

OFFICE OF THE CHIEF OF STAFF

5 December 1945

The United States Chief of Counsel
for Prosecution of Axis Criminality,
APO 403, U. S. Army.

MY DEAR MR. JUSTICE JACKSON:

Your response of 4 December 1945 is gratefully acknowledged. It now becomes evident that this headquarters, the Office of Military Government for Germany (U. S.) and yourself are in accord as to the appropriate organization for further prosecutions of Nazi criminals.

This headquarters readily concurs in your proposed amendment of the draft Executive Order.

It is noted that you have written a letter to the President, expressing your approval of the plan and your recommendation that the Executive Order be issued. The Theater Commander is addressing to the Chief of Staff, War Department, a letter on "Organization for Further Proceedings Against Axis War Criminals and Certain Other Offenders", of which a copy is inclosed herewith. With it you will find the text of the proposed Executive Order as now agreed between yourself, this headquarters, and the Office of Military Government for Germany.

General Betts, Theater Judge Advocate, is being ordered to Washington on temporary duty, in order that he may present the views of this headquarters in the above matter.

Your prompt response and effective cooperation are sincerely appreciated.

For the THEATER COMMANDER:

[Signed] W. B. Smith
W. B. SMITH,
Lieutenant General, U. S. A.
Chief of Staff.

Annex 5

HEADQUARTERS

U. S. FORCES, EUROPEAN THEATER

Office of the Commanding General

5 December 1945

Subject: Organization for Further Proceedings against Axis War Criminals and Certain Other Offenders.

To: The Chief of Staff, War Department, Washington, D. C.

1. By directive JCS 1023/10, there was imposed upon the Theater Commander responsibility for causing the following crimes to be punished:

a. Atrocities and offenses against persons or property constituting violations of international law, including the laws, rules and customs of land and naval warfare;

b. Initiation of invasions of other countries and of wars of aggression in violation of international laws and treaties; and

c. Other atrocities and offenses, including atrocities and persecutions on racial, religious or political grounds, committed since 30 January 1933.

The enormous scope of this directive, and particularly of category "c" above, has been carefully considered. The words, if extended to their full literal meaning, would appear to embrace all the offenses committed in Germany since the Nazi regime came into power. "War crimes" as thus defined has a much larger meaning than that given in the War Department letter of 25 December 1944 on "Establishment of War Crimes Offices", AG 000.5 OB–S–A–M, and in War Department Circular No. 256 of 22 August 1945.

2. Toward achieving the purposes of the above direction the following action is in progress:

a. The War Crimes Branch under the Theater Judge Advocate, established in this theater by a directive of 24 February 1945, is investigating and preparing for trial cases of

(1) violations of the laws of war to the prejudice of United States nationals, notably prisoners of war, and

(2) atrocities committed in the concentration camps overrun by the United States Forces.

These cases are being brought to trial before military commissions or military government courts.

b. Mr. Justice Jackson, acting under Executive Order No. 9547 of 2 May 1945, is prosecuting Case No. 1 against 22 defendants and seven groups or organizations before the International Military Tribunal.

3. Extensive study has led to the firm conclusion, on the part of all interested parties in this theater, that Mr. Justice Jackson's organization should be continued as the agency responsible for the prosecution of cases of Axis criminality not falling within the scope of the War Crimes Branch. A plan has been prepared for carrying forward that office, enlarging its field of activity so that it would be able to prosecute cases in zonal courts as well as in an International Military Tribunal, and providing that when Mr. Justice Jackson shall withdraw from his office, its functions, duties and powers shall pass to a Chief of Counsel for War Crimes to be appointed within the Office of Military Government for Germany (US). The details will be found in papers inclosed herewith. In particular, it is recommended that an Executive Order as indicated in the attached draft (Incl. 4) be issued. All of this has been carefully matured in consultation between this headquarters, the Office of Military Government for Germany (US) and the United States Chief of Counsel. Mr. Justice Jackson has written a letter to the President approving the plan and urging specifically that the Executive Order be published.

4. Upon the publication of the desired Executive Order, it is intended to go forward, as promptly as circumstances permit, to the prosecution of other leading Nazis, and to the disposition of the cases of members of such Nazi organizations as may be declared criminal. The extent of the prosecutions of Nazi offenders will be determined within the Office of Military Government for Germany in consonance with the instructions of the War Department. The prosecution of "membership cases" consequent upon a determination of the criminality of the indicted organizations will, it is estimated, reach a magnitude of between 100,000 and 200,000 individuals. Appropriate procedures are now being developed in anticipation of this eventuality.

5. It has become evident that the occupational authorities cannot by their own means seek out and punish all of the countless offenses committed within Germany since 1933. Accordingly it has been decided that as rapidly as German criminal courts can be reorganized and staffed by prosecutors and judges free from Nazi taint they shall be called upon to undertake the prosecution of this class of cases. This will not merely effect an economy in our own strength: it will be a test

of German regeneration and in accord with current policies and developments in military government in Germany. Such prosecutions will, of course, always be under the supervision of the American occupation authorities.

6. How far down the scale of Nazi criminality our prosecutions are to be carried is a matter of policy and judgment which, it is believed, should be left within the sound discretion of the Military Governor. It must be recognized that a literal compliance with JCS 1023/10 is, in practice, out of the question.

It is submitted that an effective execution of the plan herein proposed, with such means as may be available, should be accepted as an adequate fulfillment of the responsibilities placed upon the Theater Commander by that directive.

7. Approval is requested of the plan and course of action herein outlined for achieving the purposes of JCS 1023/10, and it is further requested that the necessary steps be taken to obtain publication of an Executive Order as indicated above.

[Signed] Joseph T. McNarney
JOSEPH T. McNARNEY
General, U. S. Army
Commanding

Annex 6

EXECUTIVE ORDER NO.

1. Paragraph 1 of Executive Order No. 9547 of May 2, 1945, is hereby amended to read as follows:

1. Associate Justice Robert H. Jackson is hereby designated to act as the Representative of the United States and as its Chief of Counsel in preparing and prosecuting charges of atrocities and war crimes against such of the leaders of the European Axis powers and their principal agents and accessories as the United States may agree with any of the United Nations to bring to trial before an international military tribunal. The Chief of Counsel is further authorized to proceed before United States military or occupation tribunals, in proper cases, against other Axis adherents, including but not limited to cases against members of groups and organizations declared criminal by said international military tribunal. He shall serve without additional compensation but shall receive such allowance for expenses as may be authorized by the President.

2. The present Chief of Counsel is authorized to designate a Deputy to whom he may assign responsibility for organizing and planning the prosecution of further charges of atrocities and war crimes, other than the indictment now being tried as case No. 1 in the International military tribunal, and, as he may be directed by the Chief of Counsel, for conducting such further prosecutions.

3. Upon the termination of the appointment of Associate Justice Robert H. Jackson as Representative of the United States and its Chief of Counsel, the functions, duties and powers specified in Executive Order No. 9547 of May 2, 1945, shall be vested in a Chief of Counsel for War Crimes to be appointed by the United States Military Governor for Germany or his successor.

Appendix G

EXECUTIVE ORDER 9679

AMENDMENT OF EXECUTIVE ORDER NO. 9547 OF MAY 2, 1945, ENTITLED "PROVIDING FOR REPRESENTATION OF THE UNITED STATES IN PREPARING AND PROSECUTING CHARGES OF ATROCITIES AND WAR CRIMES AGAINST THE LEADERS OF THE EUROPEAN AXIS POWERS AND THEIR PRINCIPAL AGENTS AND ACCESSORIES"

By virtue of the authority vested in me as President and Commander in Chief of the Army and Navy, under the Constitution and statutes of the United States, it is ordered as follows:

1. In addition to the authority vested in the Representative of the United States and its Chief of Counsel by Paragraph 1 of Executive Order No. 9547 of May 2, 1945, to prepare and prosecute charges of atrocities and war crimes against such of the leaders of the European Axis powers and their accessories as the United States may agree with any of the United Nations to bring to trial before an international military tribunal, such Representative and Chief of Counsel shall have the authority to proceed before United States military or occupational tribunals, in proper cases, against other Axis adherents, including but not limited to cases against members of groups and organizations declared criminal by the said international military tribunal.

2. The present Representative and Chief of Counsel is authorized to designate a Deputy Chief of Counsel, to whom he may assign responsibility for organizing and planning the prosecution of charges of atrocities and war crimes, other than those now being prosecuted as Case No. 1 in the international military tribunal, and, as he may be directed by the Chief of Counsel, for conducting the prosecution of such charges of atrocities and war crimes.

3. Upon vacation of office by the present Representative and Chief of Counsel, the functions, duties, and powers of the Representative of the United States and its Chief of Counsel, as specified in the said Executive Order No. 9547 of May 2, 1945, as amended by this order, shall be vested in a Chief of Counsel for War Crimes to be appointed by the United States Military Governor for Germany or by his successor.

4. The said Executive Order No. 9547 of May 2, 1945, is amended accordingly.

HARRY S. TRUMAN

THE WHITE HOUSE
January 16, 1946

Appendix H

OFFICE OF U.S. CHIEF OF COUNSEL
APO 134A U.S. ARMY

29 March 1946

GENERAL MEMORANDUM NO. 15
Subject: Organization for Subsequent Proceedings.

In order to expedite the preparation of subsequent cases and to assure continuity in their management, it has been agreed that a division shall now be set up in the Office of Chief of Counsel temporarily, but eventually to be transferred intact to Military Government, and that such division function under a Deputy Chief of Counsel who, upon retirement of the present Chief of Counsel, shall become Chief of Counsel for War Crimes under Military Government.

Accordingly, the President of the United States on January 16, 1946 amended the Executive Order No. 9547 of May 2, 1945, which provided for representation of the United States in prosecuting war crimes, by adding:

". . . 2. The present Representative and Chief of Counsel is authorized to designate a Deputy Chief of Counsel, to whom he may assign responsibility for organizing and planning the prosecution of charges of atrocities and war crimes, other than those now being prosecuted as Case No. 1 in the International Military Tribunal, and, as he may be directed by the Chief of Counsel, for conducting the prosecution of such charges of atrocities and war crimes.
"3. Upon vacation of office by the present Representative and Chief of Counsel, the functions, duties, and powers of the Representative of the United States and its Chief of Counsel, as specified in the said Executive Order No. 9547 of May 2, 1945, as amended by this order, shall be vested in a Chief of Counsel for War Crimes to be appointed by the United States Military Governor for Germany or by his successor."

NOW, THEREFORE, I do hereby

1. Name and appoint Colonel Telford Taylor as Deputy Chief of Counsel and assign to him responsibility for organizing and planning the prosecution of charges of atrocities and war crimes other than those now being prosecuted as Case No. 1 in the International Military Tribunal as provided in Article 2 of the Executive Order.

2. Transfer to the jurisdiction of the said Deputy Chief of Counsel the Subsequent Proceedings Division created by General Memorandum No. 13 on January 12, 1946, subject however to the administrative control of the Executive Officer, Brigadier General Robert J. Gill. O.C.C. personnel which is no longer needed for the present trial may be assigned to the Subsequent Proceedings Division. Additional personnel necessary will be employed for or assigned to the Subsequent Proceedings Division and it is to be noted that certain restrictions applicable to O.C.C. personnel may not be applicable to the recruitment of new personnel which may be employed under Military Government regulations. All recruitment and activity of the Subsequent Proceedings Division is subject to the priority of Case No. 1 now pending. Nothing in this order affects the responsibility for conduct of Case No. 1 to its completion.

Insofar as possible, separate records will be maintained of all personnel, salaries, expenses, and other administrative matters.

[Signed] Robert H. Jackson
ROBERT H. JACKSON
Chief of Counsel

Appendix I

MINUTES OF CHIEF PROSECUTORS HELD IN ROOM 117, 1730 HOURS, 5 APRIL 1946

Present:	Mr. Justice Jackson Mr. Dodd	American Delegation
	General Rudenko	Soviet Delegation
	M. Champetier de Ribes	French Delegation
	H. M. Attorney-General Sir D. Maxwell-Fyfe Col. Phillimore	British Delegation

The Attorney-General said he had three points which he wished to discuss with his colleagues. The first two were—

1) The time which the trial was taking, and

2) the question of the second trial.

* * * * * * *

2. *SECOND TRIAL*

The Attorney-General pointed out that this could not start until the end of this trial since many issues would be rendered *res judicata* by these proceedings. They wished to take advantage of this whilst, in any event, shortage of manpower would make it impossible to run separate proceedings at the same time. He wondered what public opinion would think of a second trial if this had lasted a year and was inclined to think that the industrialists should be tried before national courts but if the majority of his colleagues felt that a second trial before an international tribunal should take place then he thought that preparations must be started now. He had got to bring in a new team, the personnel of which would not be easy to find and who would have to work in with the present team so as to take advantage of their experience. He felt, therefore, that a decision on the second trial ought to be taken now, one of the difficulties being, however, that the Agreement came to an end on the 8th August and it looked as if this trial would last at least until then.

General Rudenko said he was in favor of a second trial by the International Military Tribunal but conclusion could not be reached until the finish of this trial was seen. If this trial ended before August they could discuss a second trial but if it went beyond the 8th August they would not have the power to do so. He entirely agreed that if there was to be a second trial the staff ought to be incorporated with the present staff during the preparatory stages.

M. de Ribes said the French position remained the same and they were in favour of a second trial before the International Military Tribunal. It would be useful, however, only if two conditions were fulfilled—

1) If its actual duration was shorter than that of this trial;

2) As a corollary to 1) if it was adequately prepared in advance. The great thing was to examine the evidence now to see whom they had got a case against and he had already set a section of his team to work on this.

Mr. Justice Jackson said that he himself could not participate and that the nomination of Col. Taylor did not commit the United States to a second trial. He agreed generally with the French and Soviet Delegations that the ground work must be got on with but he could not commit the United States to a second trial until they had seen the result of this one. If the Tribunal held that there was no case against Schacht he did not see how they could hope to make a case against any industrialists. There were other considerations; for example, the cost. It would not be long before there was serious criticism of the cost of this trial. He felt sure the industrialists should be tried but was not yet certain of the best method.

The Attorney-General agreed that the point with regard to Schacht had a great deal of force and suggested that they should go no further at present than to agree to get out briefs against, say, ten defendants, with a view to deciding later whether they should be indicted before national courts or the International Military Tribunal. This work should be done in collaboration between the four delegations by personnel specially detailed to prepare the ground work for the second trial. *THIS WAS AGREED.*

Appendix J

MEMORANDUM FOR THE SECRETARY OF WAR

Subject: American Participation in a Second International Trial of Nazi War Criminals

References: (1) Mr. Justice Jackson's Memorandum for the President of 13 May 1946 (Tab A)
(2) Brig. Gen. Taylor's Memorandum for Mr. Benjamin Cohen of 18 June 1946 (Tab B)
(3) Brig. Gen. Taylor's Memorandum for Mr. Justice Jackson of 27 June 1946 (Tab C)
(4) Sir Hartley Shawcross' letter to Mr. Justice Jackson of 25 July 1946 (Tab D)

1. At Mr. Justice Jackson's request, I am submitting to you this report on American participation in a second international trial of Nazi war criminals.

2. It is my recommendation, based on all circumstances now known to us, that the United States should agree to participate in a second international trial.

3. This report and my recommendations are based upon discussions during the past three months with Mr. Justice Jackson, with the Counselor to the State Department (Mr. Benjamin Cohen) and (through Mr. Cohen) with the Secretary of State, upon committee meetings and informal discussions with the representatives of the other three interested nations,[1] and upon my estimate of the prospects for an expeditious and successful international trial along the lines described hereinafter.

BACKGROUND

4. The circumstances which have given rise to quadripartite discussion of a second international trial are set forth in Mr. Justice Jackson's memorandum to the President (Tab A) and my memorandum to Mr. Benjamin Cohen (Tab B). Summarized, these circumstances are as follows:

(a) The Soviet Government has at all times favored a series of international trials;

(b) Partly as a result of the Soviet attitude, the London Agreement (8 August 1945) envisages a series of trials;

(c) As a result of and since the "Krupp episode" (Tab B), the French Government has actively favored a second international trial; and

(d) Also as a result of the Krupp episode, discussion of a second international trial has centered around German private industrialists and financiers.

ATTITUDE OF THE OTHER THREE GOVERNMENTS

5. The Soviet Government has at all times favored a series of trials, and has recently officially advised us that they favor and will participate in a second trial.

The French government has repeatedly announced its desire to participate in a

[1] I have transmitted to the Assistant Secretary of War (Mr. Petersen) the minutes of these committee meetings and various memoranda summarizing the discussions.

second international trial, and is pressing us for an expression of our attitude.

The British government has been lukewarm, but its Attorney-General has now advised us that he favors an early declaration for a second trial, and that he feels "little doubt that the British government will adopt this view." (Tab D)

THE ALTERNATIVE—REFUSAL TO PARTICIPATE

6. The London Agreement remains in force indefinitely, subject to the right of any signatory to terminate after one month's notice of intention to do so. As long as the Agreement remains in force, any two of the chief prosecutors can designate "major war criminals to be tried by the Tribunal." (Article 14.)[2]

7. Accordingly, unless the London Agreement lapses by mutual consent and desuetude, we can refuse to participate in a second international trial only by giving notice of our intention to terminate the Agreement. In that event, the entire responsibility for terminating the international machinery will fall on the United States. The Soviets and French wish to continue the international process, and Sir Hartley Shawcross' letter (Tab D) indicates that the British would be reluctant to accept the "political opprobrium" of termination. It is possible, of course, that high level diplomatic negotiations might bring about a change in this situation; of this possibility I am in no position to judge.

8. It is probable, though not absolutely clear, that a termination of the London Agreement is a complete termination for all purposes, so that Articles 10 and 11, relating to zonal trials of members of organizations, would be terminated. Furthermore, the Article (6) which specifies the three categories of crimes, would probably likewise disappear. Although I have not fully examined the question, I believed that these consequences would be harmful to our zonal trials under Control Council Law No. 10 and embarrassing to the denazification program. Certainly the consequences would not be helpful.

9. What is more important, termination of the London Agreement by the United States alone, or at its instigation, would, it appears to me, be most unfortunate from the standpoint of general international jurisprudence. The United States, through Mr. Justice Jackson, was the source of the inspiration and energy which brought about the London Agreement. The United States has an enormous moral investment in the declarations of the London Agreement. If the United States now becomes the prime mover for termination of the Agreement, this cannot help but injure the prospects for universal acceptance of the principles embodied in the Agreement. A termination could, to be sure, be presented and explained as being, not a renunciation of those principles, but a mere decision that one international trial in Europe is enough. But I doubt that such explanation will completely satisfy the peoples of the other signatories and adherents who are still eager to put those principles into practical application.

10. If we decide not to participate in a second trial, despite the Soviet and French desires, that decision will no doubt have certain diplomatic consequences. It is not my responsibility to weigh the nature or importance of these consequences. The results of my inquiry to the Secretary of State are set forth in Tab C. The probable views of the British Government are suggested in Tab D.

11. The probable attitude of the American public toward a second international trial, or towards our refusal to participate in such a trial, I am in no position to gauge. Obviously, this is an important consideration.

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[2] In fact, Alfried Krupp has been so designated already, and the French have handed us a "note" making this point and arguing that the four nations are therefore bound to try Alfried Krupp before the International Military Tribunal.

12. All four governments are agreed that the second trial should be much smaller in scope, both as to number of defendants and subject matter, than the present trial. The defendants should not exceed six or eight in number. The trial should be (and, it is believed, can be) so planned that it will not last over three months.

13. All four governments are agreed that the main emphasis of the trial should be on German industrialists and financiers. All four governments are agreed that the defendants should include Alfried Krupp, Hermann Schmitz and Georg von Schnitzler (both of I. G. Farben),[3] Kurt von Schroeder, and Hermann Roechling. The Soviet government has reserved the right to suggest one or two additional banking or industrial defendants.

14. The American prosecution would be expected to take primary responsibility for preparing and presenting the case against the Farben defendants and Alfried Krupp. The British prosecution will take primary responsibility on Kurt von Schroeder and assist on Krupp. The French will take the main responsibility on Roechling,[4] and the Soviets on the one or two additional defendants to be suggested by them.

15. The other three governments are agreed that a second trial should be concerned exclusively with private industrialists and bankers, both because this group is the only one not represented in the present trial (Tab B, paragraph 9), and because concentration on a single subject matter will greatly shorten the trial. I agree with the view of the other governments. I doubt that it could be effectively charged that private industrialists are being "singled out" in view of the circumstances that (a) the present trial does not include any true representative of this category at all, and (b) the second trial would run simultaneously with our "zonal" trials in which SS leaders, militarists, government officials, and other diverse types will be defendants. In any event, the addition of a number of defendants of other types to the second international trial would make the impact too diffuse, the list too large, and indubitably lengthen the proceeding. The addition of only one or two such defendants would still result in diffusion and would probably attract attention to the emphasis on private industry by making it appear that we were trying to conceal it.

16. In summary, I foresee no substantial difficulty in reaching a final agreement with the other governments on a list of six to eight leading Nazi industrialists and bankers (including the five mentioned in paragraph 13, above), or in agreeing with them upon a workable division of responsibility for preparing and presenting the case against them.

17. Our research to date satisfies me that we will be able to prove serious charges of war crimes (both in the traditional "Hague Convention" sense and under Article 6 of the Charter) against the defendants listed above. They, and other prominent industrialists, joined with German leaders in other walks of life (military, police, diplomatic, etc.) in assisting Hitler's rise to power, waging aggressive war, plundering occupied countries, and deporting civilians to slave labor under inhuman conditions. None of the listed defendants is in any position to use the defense of "change of heart" which Schacht has capitalized on in the present proceeding. The following skeleton outline of the presently available evidence is conservative:

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[3] The United States has reserved the right to name Max Ilgner as an additional Farben defendant should his addition prove desirable from a legal standpoint.

[4] There have been doubts about Roechling's physical condition, but an American Army doctor and cardiac specialist, after thorough examination, has recently advised us that Roechling is physically able to stand trial.

(*a*) *Schroeder.* A Cologne banker who participated as a supporter of Hitler in the negotiations with Papen and others which brought Hitler to power. He was close to Himmler and was a prime mover in raising funds for Himmler's "special purposes" from industrial and banking circles. He was a devotee of Nazi principles, and played a leading part in the "Aryanization" program and in introducing Nazi doctrines such as the "Fuehrerprincip" into the organization of German private industry.

(*b*) *Roechling.* A Saar iron and steel man who was close to Hitler at least as early as 1933. A violent Nazi, wedded to Hitler's aggressive aims, and anti-Semitic. In 1936 he submitted a memorandum to Hitler which might have been one of Hitler's own; "War is inevitable"; "the German people must first be strengthened spiritually for the battle . . . to a great extent through National Socialist Education." He became the chief agent for Nazi control of the iron industry, and committed extensive spoliation of iron and steel resources in France and other countries.

(*c*) *I. G. Farben representatives.* Under the leadership of Schmitz, Schnitzler, and Ilgner, I. G. Farben made heavy financial contributions to the Nazis beginning in February 1933; through an affiliate (VOWI) conducted Nazi propaganda and intelligence activities in foreign countries; collaborated closely with the Wehrmacht on armament and equipment with knowledge, at least by 1936, that Hitler intended to wage aggressive wars; and committed spoliation and slave-labor crimes in Germany and the occupied countries.

(*d*) *Alfried Krupp.* In 1937, when Alfried Krupp (then 30 years old) first took a responsible position in the Krupp firm, he was already a Nazi and had made personal contributions to the Party. In 1940 he became the actual manager of Krupp activities, and thereafter took over many of the activities of his father (Gustav Krupp) as a leading Nazi supporter among the industrialists, both as a source of funds and as an agent for management in line with Nazi interests. By a Hitler decree, Alfried became the owner of the Krupp interests in 1943. The Krupp firm, with Alfried at the head, is particularly chargeable with extensive and utterly inhuman use of slave labor and with spoliation on a wide scale.

NATIONALITY OF THE PRESIDING JUDGE

18. Mr. Justice Jackson and I are both strongly of the opinion that the presiding judge at a second trial should be either American or British (Tab A, paragraph 6; Tab B, paragraph 16). The British share our view (Tab D). The French do not want to preside and will probably support a nomination of either a British or an American president. The Soviets are unwilling to commit themselves in advance of selection of the judges (Tab D).

19. Under the London Agreement, the members of the Tribunal select their own president (Article 4). However, on this question the judges would undoubtedly vote according to instructions from their respective governments. The presiding judge in the present trial is British, and the same article of the London Agreement states that "the principle of rotation of presidency for successive trials is agreed." This militates against, but in my opinion does not absolutely preclude, the selection of a British judge for the second trial.

20. The British are prepared to make an informal agreement with us that the British and American judges will under no circumstances vote for a Soviet or French president. Such an agreement would foreclose the possibility of the selection of a Soviet or French president and, barring the remote possibility of a complete change in the French attitude, would insure the election of a British or American president.

21. In view of the "rotation" principle in Article 4 of the Charter, it may be easier to select an American than a British president. It may be, however, that a continuance of British presidency would tend to insure energetic and able British participation in the case. I think that this question can best be decided after the British and ourselves have chosen the judges for a second trial, and the British are willing to leave the matter open until that time. Undoubtedly the British and American judges will be all new, as none of the present incumbents wants to remain for a second trial.

23. In summary, I recommend entering into the agreement described in paragraph 20 above, in order to insure the selection of a British or American president, the choice to be made in the light of all the circumstances when the vote is taken.

LOCATION OF THE TRIAL

23. [sic] The four nations are now agreed that the trial should take place either in Nuernberg or Berlin. The Soviets prefer Berlin. The British and French strongly prefer to remain in Nuernberg. We have not yet taken a position on this question, which under the Charter (Article 22) is decided by vote of the judges, but which as a practical matter must be agreed upon in advance and as soon as possible.[5]

24. Nuernberg is a going concern for international war crimes trials; Berlin is not. In my opinion, there are three strong objections to moving the trials to Berlin:

(*a*) *Delay.* If the second trial is held at Nuernberg, it can probably be begun 30 days after the completion of the present trial (hardly sooner, since it would be unwise to file the indictment prior to the handing down of the opinion in the present trial, and the defendants should have 30 days' notice before starting trial under the indictment). Transplantation of the personnel and equipment for a second trial (much of which is impossible until the present trial is finished) would unquestionably delay the opening of the second trial. Even if the American delegation moves quickly, the other three countries cannot be counted [upon] to do the same.

(*b*) *Loss of administrative and technical continuity.* The war crimes staff (lawyers, clerks, interpreters, technicians, service personnel) knows its way around Nuernberg. Acclimatization to a new site would certainly involve much pulling and hauling and general upset. Many of the birth pangs of the early days at Nuernberg would be encountered all over again.

(*c*) *Geographical splitting of the Office, Chief of Counsel.* Quite apart from a second international trial, the Office, Chief of Counsel is directed to carry out a substantial program for the trial of Nazi war criminals under Control Council Law No. 10 before courts established in the American zone under the authority of the Military Governor. The headquarters of the Office, Chief of Counsel must, therefore, remain in the American zone. If the international trial is at Berlin, the Office, Chief of Counsel will be widely split, with resulting loss of efficiency and increase in transportation requirements.

25. On the other hand, some financial economies would be gained by us in Berlin, as we would no longer have to billet and mess the delegations of the other three countries. They could live and eat in their own sectors of Berlin. Whether these savings would be greater than the expenses of moving to Berlin and the "demurrage charges" from probable delay in opening the second trial, I do not know.

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[5] The Secretary of State has informally advised that Nuernberg should remain the seat of the Tribunal for a second trial (Tab C, paragraph 3).

26. On balance, I recommend that the second international trial, if held, should be at Nuernberg. The financial savings from a shift to Berlin appear to me highly speculative. The disadvantages of the shift, set forth in paragraph 24 above, seem to me very serious.

CONCLUSION

27. The question for decision is not a simple one, and there are risks and disadvantages in either course of action. A second international trial may take longer than I now expect, or end less successfully than I now hope. But the disadvantages of refusing to participate are very apparent and substantial, and, to my mind, are conclusive.

28. Accordingly, I recommend that the United States should, in the very near future:

(*a*) Publicly agree to participate in a second international trial along the lines set forth herein and select judges for the trial;

(*b*) Informally agree with the British on the question of the nationality of the presiding judge as set forth in paragraphs 20–22 above; and

(*c*) Make Nuernberg available as the seat of the trial if the other signatories, or a majority of them, desire to continue there.

[Signed] Telford Taylor
TELFORD TAYLOR
Brigadier General, USA
Deputy Chief of Counsel

Copies to: Mr. Justice Jackson
Mr. Benjamin Cohen (for the Secretary of State)
Gen. Lucius D. Clay (for the Military Governor)

TAB A

MEMORANDUM FOR THE PRESIDENT ON AMERICAN PARTICIPATION IN FURTHER INTERNATIONAL TRIALS OF NAZI WAR CRIMINALS

The question whether the United States should participate in further international trials of Nazi war criminals will shortly be presented to you. There are some arguments for and some against the proposal, and the purpose of this memorandum is to lay before you certain facts and considerations which should not be overlooked in reaching a decision.

a. The Position of the Allied Governments.

The position of other governments seems to be this. Russia has at all times favored a series of international trials, and of course favors another. France favors at least one more. The English have expressed doubt about its wisdom, but consider themselves committed to France in favor of another trial. The commitment was made to get France to vote against the United States' proposal to amend the indictment to include Alfried Krupp as a defendant. The United States is not committed either for or against, but I have at all times reserved complete freedom of decision in the matter.

b. The Argument for Further International Trials.

The argument for further trials is that below the level of those we are now prosecuting there are others, also guilty and of high rank or influence. Especial emphasis has been placed on the fact that although many industrialists aided German's illegal rearmament, they are not being tried (except as Schacht may represent finance). To fail to proceed against them will probably arouse criticism in our own country from many who think big businessmen are escaping too lightly. Also, if the other three countries come forward with feasible and equitable plans

for further trials, it might incur some criticism if the project failed by abstention of the United States. All this may be admitted, and the question is still whether other considerations should move use to decline.

c. Considerations to be Weighed by the United States.

1. *Public reaction.* We have proceeded against the biggest surviving Nazi officials with the best known names. The strongest cases have been presented against the most responsible leaders, and the evidence against the Nazi government has been pretty much exhausted. Whether under these conditions a second trial will not be an anticlimax in public opinion, I do not know.

2. *Strength of the second case.* Our strongest cases are now being tried. The outcome may not be known until perhaps September. While I do not anticipate such a thing, if there should by any chance be acquittals of any substantial number of the present defendants, or of such a key figure as Schacht, for example, we might then find further trials inadvisable. If meanwhile we had committed ourselves to try weaker cases, it would be embarrassing to withdraw and more so to be defeated. The acquittal of Schacht would be a precedent nearly fatal to the less convincing cases against industrial or financial figures. Few businessmen had such close relations with the regime or held offices which imply knowledge of the political plans and aggressive intentions behind rearmament, as did Schacht. On the other hand, few of them had so open a break with the regime as he had after 1943, for he ended in a concentration camp. All I can say is that prudent planning will require us to assume that the strongest cases against industrialists in the second trial will be no better and probably weaker than the case against Schacht, which ranks as one of the weakest in the present trial.

3. *The defendants in the proposed second case.* It has been proposed that the defendants be largely, if not entirely, industrialists and financiers. A trial in which industrialists are singled out may give the impression they are being prosecuted merely because they are industrialists. This is the more likely since we would be associated in prosecuting them with the Soviet Communists and the French Leftists. The argument for their trial is that unless industrialists are tried in a second international trial, they may escape all penalty. But on this count the American record is clear. The United States proposed to indict several of them along with the present defendants in this case, and it was *the unanimous vote* of the *three other nations* which defeated our suggestion. I told the other three prosecutors at the time that sentiment in my country would never understand why industrialists were not prosecuted, but that the people of my country would understand a three-to-one vote, and that I should have to make public that fact. I have made it a part of the record here. The fact is that some of the other prosecutors, especially the French, are politically on the spot to take action. We are not on any such spot. The further answer to this is that industrialists can be reached and punished through the denazification program even though they are not tried internationally.

I also have some misgivings as to whether a long public attack concentrated on private industry would not tend to discourage industrial cooperation with our Government in maintaining its defenses in the future while not at all weakening the Soviet position, since they do not rely upon private enterprise.

Also, a trial directed solely against industry would emphasize a weakness inherent in our joint prosecutions, but which we have so far kept from becoming too embarrassing. If we prosecute industrialists who provided Germany with tanks to invade Poland, what about the Commissars who built tanks for Russia at the same time to invade Poland? Industrialists, in their defense, would have the experience of this case to go by, and they are likely to be better defended and to strike back more stridently than has yet been done in the present trial.

4. *Difficulties of international trials.* This method of trial is necessarily more expensive and prolonged than trial by a single power. It involves long recesses and delays while judges used to different procedures settle objections and questions of evidence. It requires a complicated interpretation system in which four languages are used, documents must be translated into four texts, proceedings are stenographically recorded in four languages, and transcripts are written up in all four. The presence of four prosecutors means a good many maneuvers for reasons of prestige at home. Subjects are brought up that have no legal importance but are politically useful. For instance, witnesses thoroughly cross-examined by the British or by ourselves have been questioned with lengthy futility by the Soviet prosecutors for reasons of home consumption. There are many other difficulties which I need not detail, but which have been overcome only by great patience and many concessions.

5. *Place of any future trial.* The United States has never offered to be host at Nuernberg for more than one trial. All the countries now represented here would apparently like to have us act as host again. There are reasons why a minimum of trouble would be caused by continuing here: Nuernberg is a going concern. But the task of being host involves heavy financial and administrative burdens. It involves security for prisoners and witnesses, security and entertainment for judges' and prosecutors' staffs and the VIP's of all nations. It involves danger of incidents and charges of discrimination. The representatives of the other countries have brought here staffs far in excess of what I think were their legitimate needs, all of whom have been required to be billeted and messed at the expense of the United States. They have insisted on bringing members of their families at a time when United States personnel was not permitted to do so. On the other hand, some of these powers defaulted in providing the useful personnel which they had promised, particularly translators and interpreters. The result of all of this has been an extremely costly trial. In order to avoid its collapse we have had to assume burdens far beyond what was originally contemplated. I am informed that Military Government has plans for other use of the facilities in Nuernberg which will be interfered with if they are devoted to a future trial.

6. *Personnel of future Tribunal.* There is little doubt that the Powers would insist that in any future trials the Presidency of the Tribunal should not be held by the same nation whose representative has presided at this trial. This would exclude the British. Choice of a Soviet or French judge would involve a risk that their handling, while in accord with their own jurisprudence, would not commend the trial as a fair one to Americans. So far, no one, not even the defendants or the German press, have complained of unfairness in the present procedure. If an American judge presides, you may have difficulty finding one whose experience in foreign as well as domestic affairs is adequate. Then, too, with an American presiding officer, with nearly all the evidence ours, with most of the prisoners ours, and with the lead in the prosecution ours, we will have full responsibility for the second and weaker trial. I have misgivings about the United States, so long after the war, getting into this position. I think we should shed responsibility rather than assume more, where it seems doubtful that the responsibility can be discharged successfully.

7. *Certain purposes already accomplished.* The purpose of authenticating the captured documents which prove the responsibility of Germany for starting the war, and of proving the high planning of atrocities and war crimes, has been fully accomplished. Little can be added by a second trial except subsidiary detail. The principles we contend for in International Law are established by one trial, are being adopted and followed the world over, and would gain little from a second trial.

8. *Conclusion.* While much may be said on both sides, the balance of my judgment at this time is against further international trials. It is not so strong that great insistence by other nations, refusal of which would create embarrassments in foreign relations, might not change it. But I see little to be gained, from our American point of view, and a good deal to be risked. At the present time I would not recommend United States participation in another trial.

Of course, failure to proceed by this method does not interfere with trials before American Military Commissions for specific war crimes, nor against members of the organizations which we expect this Tribunal to declare criminal ones. Practically every industrialist in Germany can be convicted of using slave labor, and many can be proven guilty of illegal use of prisoner-of-war labor. These are specific crimes easily established. Also, broader charges may be prosecuted in occupation courts and an even wider program of punishment is available through the denazification program.

As the responsibility for conducting future trials will be on General Taylor, his recommendations, which I assume will reach you soon through the War Department, should be given much and perhaps decisive weight.

As this matter concerns the Departments of State, War, and Justice, especially, I enclose copies for the respective Secretaries if you see fit to pass them on.

If you reach any conclusion one way or the other it would be useful if we could know of it, for the shaping of our future course in this present trial might be influenced in some ways by the decision as to subsequent proceedings.

Respectfully submitted,

[Signed] Robert H. Jackson
ROBERT H. JACKSON
Chief of Counsel for the
United States

NUERNBERG, GERMANY,
May 13, 1946.

TAB B

JUNE 18, 1946

MEMORANDUM FOR MR. BENJAMIN COHEN

Subject: American Participation in Further International Trials of Nazi War Criminals

Reference: Mr. Justice Jackson's Memorandum for the President dated May 13 1946 on the same subject (copy attached hereto).

1. This memorandum, written pursuant to our conversation this morning, attempts to summarize the present situation with respect to American participation in a second *international* trial of German war criminals. It is not a final report, and I do not believe that a decision need or should be made immediately.

2. There will in any event be further trials of major German war criminals before American tribunals to be established within the American occupational zone. The immediate question is whether the United States should participate in a second *international* (quadripartite) trial under the London Agreement (8 August 1945).

THE LONDON AGREEMENT

3. The London Agreement remains in force until 8 August 1946, and remains in force thereafter, subject to the right of any signatory to give one month's notice of intention to terminate it.

4. The London Agreement constitutes the International Military Tribunal as a semipermanent body and envisages a series of trials. "The principle of ro-

tation of presidence for successive trials is agreed" (Article 4), "The permanent seat of the Tribunal shall be in Berlin . . . . The first trial shall be held at Nuernberg, and any subsequent trials shall be held at such places as the Tribunal may decide" (Article 22). The indictment is entitled as "Case No. 1." Other examples can be cited. However, the charter nowhere *requires* that there be more than one trial.

THE KRUPP EPISODE

5. The list of defendants for the present trial includes Gustav Krupp. Shortly before the trial began (20 November 1945), it developed that Krupp was very ill and mentally incompetent. The Tribunal, for this reason, ordered his trial severed from the present proceedings. Undoubtedly Gustav Krupp can never be brought to trial, as there is no chance that he will recover.

6. When Gustav Krupp's illness was discovered, Justice Jackson moved to include several other industrialists as defendants in the first trial. This motion failed by a three-to-one vote of the chief prosecutors. Thereafter, the French chief prosecutor moved to add Alfried Krupp (son to Gustav) to the list of defendants, and this motion carried by a three-to-one vote. (The British prosecutor voted against the motion.)

7. The Tribunal refused to include Alfried Krupp as a defendant in the first trial. However, his designation as a "major war criminal to be tried by the Tribunal" (Article 14b) still stands.

8. Simultaneously with his vote against the inclusion of Alfried Krupp, the British chief prosecutor (Sir Hartley Shawcross, H. M. Attorney-General) joined with the French chief prosecutor in a press release which stated that ". . . . the French and British delegations are now engaged upon an examination of the cases of the leading German industrialists . . . . with a view to their joinder with Alfried Krupp in an indictment to be presented at a subsequent trial."

9. The foregoing events resulted in the fact that the defendants in the present trial do *not* include a single representative of German private industry or finance. To be sure, Schacht and Funk are on trial, but they, if I may be permitted a domestic parallel, are more like Jesse Jones or Morgenthau than J. P. Morgan or the Duponts.

THE PRESENT SITUATION

10. Now that the present trial is drawing to a close (estimated for 15 August to 15 September), the question of a second trial has again been raised among the chief prosecutors. No formal action has as yet been taken, but the matter is in the "lively discussion" state and should, if possible be settled during the next few weeks.

11. As a result of "l'affaire Krupp," most discussion of a second international trial centers around German industrialists and financiers. All four delegations are agreed that, if there is another trial, the list of defendants must be short and the trial so planned that it will not take more than two or, at most, three months from start to finish. All four delegations are agreed upon Alfried Krupp, two representatives of I. C. Farben (of primary interest to the United States), Kurt von Schroeder (a prominent private banker suggested by the British), and Hermann Roechling (Saar iron and steel magnate, suggested by the French). The Soviet delegation may want to add one or two more names, but the defendants should not exceed six or, at most, eight in number.

12. The French delegation is pressing strongly for a second trial, along the lines described in the preceding paragraph. I have no reason to doubt that the French delegation accurately reflects the view of the French government, but am nevertheless taking steps to check their point.

13. The Soviet delegation has not recently expressed any official views, but they have always favored a series of international trials, and no doubt will adhere to that view and would vote for a second trial.

14. The British view has not yet crystallized. The Foreign Office is cool to the notion of another international trial; some members of the British prosecution delegation favor it, others are doubtful. However, as a result of the press release of November 1945 (paragraph 8, above) the British feel committed to join in a second trial if the other countries desire to have one.

15. The United States is not committed for or against. My instructions from Mr. Justice Jackson and the Secretary of War are to develop the most workable proposal for a second international trial upon which agreement among the four nations might be reached, and submit it to Washington for consideration. I propose to submit a report on the matter soon after my return to Nuernberg, following further consultations with the other delegations.

16. To my mind, the most critical question is the presidency of the tribunal in a second trial. French or Soviet presidency would almost inevitably lead to serious difficulties, as the trial procedure has been predominately Anglo-American in its basic concepts. With the best of intentions, a French or Soviet judge might, in the course of trial, make remarks or rulings which would sit very poorly at home, or call upon the prosecution to do things which an American or British prosecutor could not possible do. The presiding judge in Case No. 1 is English, so the only solution (and, I believe, a good one) is to have an American presiding judge for Case No. 2. The British will definitely support our view on this problem, and it is almost certain that the French will also support us. I do not know what position the Soviet delegation will take. At all events, it appears probable that we can secure agreement for an American presiding judge on a three-to-one, if not a unanimous, footing. (The Tribunal itself selects the president, under Article 4 of the Charter, but the judges would surely vote on this matter as directed by their respective governments.)

17. The location of a second trial is also an important point. The Soviet delegation will probably favor Berlin. The British favor continuance at Nuernberg. Other places so far mentioned are Paris, Luxembourg, and the Hague. Personally, I feel that any of these places will be acceptable from an American standpoint, but that Nuernberg is the most desirable, and Berlin the least.

I would be reluctant to see the trial held in such close proximity to the Control Council, since its disagreements and disputes might well infect the tribunal and the four prosecuting delegations. The advantages of Nuernberg are stated in Mr. Justice Jackson's memorandum (page 4). The disadvantages (financial and administrative), I do not believe, should be determinative on a matter of this importance. In any event, the United States can more easily bear the major expense than any of the other countries, and, wherever the trial is held, would probably have to furnish much of the wherewithal.

ALTERNATIVES

18. *Zonal Trials.* Certain industrialists and financiers could be tried by occupational courts established by each nation in its own zone (see paragraph 2, above). However, there is a legal question whether they could be as broadly charged or as effectively tried in such proceedings.

19. *Denazification Program.* This may apply to a number of industrialists and financiers. The maximum penalty under this program is 10 years' imprisonment, so it is not suitable for the more serious criminal cases. The denazification program is still in its infancy, and it remains to be seen whether it will function successfully, particularly in its application to private industrialists, as distinguished from Party leaders, SS men, etc.

20. It is highly probable that we can come to a satisfactory agreement with the other nations on the scope of a second trial, the number of defendants, etc., and so plan the trial that it could be completed within two or three months. It is probable, though by no means certain, that the question of presidency of the tribunal can be satisfactorily settled. The question of location of the trial is not as easy of solution.

21. The question of our participation in a second international trial should, I believe, be decided on a very hard-boiled basis. We are under no commitment whatsoever, and there is no reason for our joining in another trial if the plan for it presents any features seriously disadvantageous or risky from our standpoint. On the other hand, if the French and Soviet governments sincerely desire another trial, it seems to me that we should go a reasonable distance with them. The factor of American public opinion must not be overlooked, but this I am in no position to gauge.

22. Barring unforeseen developments, a specific plan for a second trial can be submitted for consideration in about two weeks.

[Signed] Telford Taylor
TELFORD TAYLOR
Brigadier General, USA
Deputy Chief of Counsel

TAB C

MEMORANDUM FOR MR. JUSTICE JACKSON 27 JUNE 1946

Subject: American Participation in Further International Trials of Nazi War Criminals.

1. Pursuant to our conversation on June 17, I visited Paris last week and conferred with Mr. Benjamin Cohen on the subject of American participation in further international trials of Nazi war criminals. I spent about an hour with Mr. Cohen Tuesday morning, June 18, and gave him a very full oral account of the present situation, and explained to him your views as you have stated them to me and as they are embodied in your memorandum to the President dated May 13, 1946.

2. Mr. Cohen asked me to provide him with a written summary of the present situation, in order that he might be accurately informed before talking to the Secretary of State. I attach a copy of the memorandum which I gave to Mr. Cohen pursuant to his request. As you will see from that memorandum I also gave Mr. Cohen a copy of your memorandum to the President. In so doing I called Ben's attention to the penultimate paragraph of your memorandum saying that I did not know what distribution the President had made, but that I was sure that you would want Ben to see your memorandum before talking to Mr. Byrnes.

3. I saw Mr. Cohen again Friday morning, June 21, after Mr. Cohen had talked to the Secretary. Ben reported the Secretary's views (stated, to be sure, while the Secretary was preoccupied with other problems) to be as follows:

(*a*) The United States should not instigate a second International trial or participate in a second trial except under circumstances which appear to be propitious for a speedy and favorable outcome.

(*b*) However, the United States cannot afford to appear to be in the position of obstructing another trial. If the plans for a second trial break down because of disagreement among the other three countries, or because one or more of the other three countries will not agree to conditions or requirements which are really necessary from an American standpoint, well and good. But if the other

countries definitely want a second trial, and are prepared to meet our requirements, we had better play along with them.

(*c*) It is important that the presidency of the tribunal be held by either a British or American judge.

(*d*) If a second trial is held, it is desirable that it be held in Nuernberg; this both from the standpoint of over-all economy and to avoid the encountering of new problems in new places.

4. At your convenience, I will report to you orally in greater detail.

[Signed] TELFORD TAYLOR

TAB D

BRITISH WAR CRIMES EXECUTIVE (E. S.)

Room 231
25th JULY 1946

DEAR MR. JUSTICE JACKSON:

I had a long talk with Brigadier Telford Taylor this morning about the question of a second trial of major war criminals and perhaps I may tell you the conclusions which I have reached as a result of that discussion.

The British are to some extent publicly committed to a second trial because of what happened in October last year. In any event, the strict position under the Charter is, as I see it, that any two powers are entitled to insist, as the French and Soviet prosecutors do insist, upon the trial of any defendants whom they agree in designating. This will be the position until the 8th August and will remain the position unless either the United States or the United Kingdom Government is prepared to accept whatever political opprobrium might result from serving a notice to terminate the agreement of the 8th August 1945. I think myself that it would be unfortunate if, at the conclusion of the present successful trial (or indeed before its conclusion) we had to put an end to the agreement. Such a course might, moreover, have some effect upon the question of zonal trials of major criminals thereafter. It is true that neither the French nor the Russians appear yet to have placed themselves upon the strict terms of the Charter but this is no reason why we should shut our eyes to the obligations which seem to arise under it. In all the circumstances, therefore, I think that we should make as early a declaration as possible that we are prepared to participate in a second trial involving the five defendants whose names have been agreed, and I feel little doubt that the British Government will adopt this view.

I do not think that it is either possible or proper to make participation in a second trial conditional upon some prior agreement between the Four Powers to appoint a British or American president. There are, it is true, very strong procedural and political reasons why in fact an American or a British judge should preside over the trial. Under the Charter, however, it is for the Tribunal to select its own president by a vote of not less than three members. In February of this year I approached Monsieur Vyshinsky and canvassed with him the possibility of agreeing in advance upon the selection of a president, nor did I exclude from this possibility the name of General Nikitchenko. Monsieur Vyshinsky, however, adhered firmly to the view that this was a matter for the Tribunal and that it could not be dealt with until the new members of the Tribunal had been appointed and were able, knowing each others qualifications, to select one of their number themselves. This is, I think, the proper view and I see no prospect of being able to overcome it by prior diplomatic negotiations. On the other hand I do not think that we are really faced with any serious practical difficulty. If the American and British judges D. M. F. for H. S. agree informally that they will not vote for a Soviet or French president it would, under the Charter, be

impossible for the Soviet or French judge to be appointed and I have no doubt whatever that the effect would be that the French would support the appointment of an American or English president. I think myself that in view of the principle of rotation, which is expressly accepted in the Charter, the president should be an American. I am, therefore, recommending my Government to announce in the near future the names of the judges whom they will nominate for a second trial, and I have stressed the importance of appointing men of high judicial standing.

I think, also, that the place of trial should not be made a condition of participation in further proceedings. At the same time there are not only political objections to transferring to Berlin, or to some town in the Russian zone, but there are for us almost overwhelming practical difficulties. We are assured by our people in Berlin that there simply is not the office and living accommodation which would be required, available in the British zone, and there is considerable doubt whether any suitable Court would be available. Moreover, the transfer of the court and office equipment, the translating apparatus and so on from Nuremberg would involve trouble and expense, and it appears to be quite clear that a transfer from Nuremberg might involve considerable delay in the commencement of proceedings which it ought otherwise be possible to start towards the end of October. I hope very much, therefore, that the United States Government may feel able to agree to the second trial taking place in Nuremberg. It has been an immense advantage to us all to have the facilities and resources which have been so generously placed at our disposal by the United States, and I see no prospect whatever of reproducing similar arrangements anywhere else.

If we are to keep the existing staffs together and to maintain the present organization as a running machine it is most desirable that final decisions should be reached early in August so that the necessary further steps can be taken. I am urging on my Government, therefore, the importance of immediate action and no doubt on your own return to Washington you will pursue the matter there.

Yours sincerely,

[Signed] HARTLEY SHAWCROSS

Mr. Justice Jackson,
Chief Prosecutor,
American Delegation.

Appendix K

SUBSTANCE OF NOTE ADDRESSED BY EMBASSIES LONDON, MOSCOW, AND PARIS TO BRITISH, FRENCH, AND SOVIET GOVERNMENTS

The United States Government has received a note from the French Government suggesting that the Committee of Prosecutors established under Article 14 of the Charter of the International Military Tribunal should reconvene as soon as possible. It is understood that similar notes were addressed to the British and Soviet Governments.

As a result of the historic international trial which has terminated at Nuernberg, the great principles of the London Agreement of August 8, 1945, have been established and applied. The American Delegation to the United Nations General Assembly sponsored a resolution reaffirming the principles of international law recognized by the Charter of the International Military Tribunal and of the Tribunal's judgment. This resolution has been adopted by the General Assembly, which has thus confirmed the permanent place of these principles in international law.

It will be recalled that Article 6 of the Agreement signed at London provided that nothing therein should "prejudice the jurisdiction or the powers of any national or occupation court established or to be established in any Allied territory or in Germany for the trial of war criminals." It would not appear necessary that all those who might be designated as "major war criminals" within the meaning of the London Agreement and the Charter of International Military Tribunal be tried before that tribunal nor that the list of major war criminals be declared closed in the manner suggested by the French Government.

The United States authorities are proceeding now with the trial of various German war criminals in Occupation Tribunals established in the American Zone in Germany. The United States Military Governor has designated a Chief of Counsel for War Crimes in charge of the prosecution in these tribunals of offenses recognized as crimes in Control Council Law No. 10. The definition of crimes in that law is substantially the same as the definition of crimes in the Charter of the International Military Tribunal. Under this program the trial of various German doctors and scientists as well as of Field Marshal Milch is now in progress at Nuernberg. Other trials of war criminals, including industrialists, will follow. It is contemplated that as many as six tribunals may be functioning simultaneously.

It is the view of this Government that further trials of German war criminals can be more expeditiously held in national or occupation courts and that additional proceedings before the International Military Tribunal itself are not required. This Government accordingly believes that there is no occasion for the Committee of Chief Prosecutors established under Article 14 of the Charter to reconvene as suggested by the French Government.

A similar note setting forth the position of this Government is being addressed to the French and Soviet Governments.

22 JANUARY 1947.

Appendix L

MILITARY GOVERNMENT—GERMANY, UNITED STATES ZONE

Ordinance No. 7

Organization and Powers of Certain Military Tribunals

Article I

The purpose of this Ordinance is to provide for the establishment of military tribunals which shall have power to try and punish persons charged with offenses recognized as crimes in Article II of Control Council Law No. 10, including conspiracies to commit any such crimes. Nothing herein shall prejudice the jurisdiction or the powers of other courts established or which may be established for the trial of any such offenses.

Article II

a) Pursuant to the powers of the Military Governor for the United States Zone of Occupation within Germany and further pursuant to the powers conferred upon the Zone Commander by Control Council Law No. 10 and Articles 10 and 11 of the Charter of the International Military Tribunal annexed to the London Agreement of 8 August 1945 certain tribunals to be known as "Military Tribunals" shall be established hereunder.

b) Each such tribunal shall consist of three or more members to be designated by the Military Governor. One alternate member may be designated to any tribunal if deemed advisable by the Military Governor. Except as provided in subsection (*c*) of this Article, all members and alternates shall be lawyers who have been admitted to practice, for at least five years, in the highest courts of one of the United States or its territories or of the District of Columbia, or who have been admitted to practice in the United States Supreme Court.

c) The Military Governor may in his discretion enter into an agreement with one or more other zone commanders of the member nations of the Allied Control Authority providing for the joint trial of any case or cases. In such cases the tribunals shall consist of three or more members as may be provided in the agreement. In such cases the tribunals may include properly qualified lawyers designated by the other member nations.

d) The Military Governor shall designate one of the members of the tribunal to serve as the presiding judge.

e) Neither the tribunals nor the members of the tribunals or the alternates may be challenged by the prosecution or by the defendants or their counsel.

f) In case of illness of any member of a tribunal or his incapacity for some other reason, the alternate, if one has been designated, shall take his place as a member in the pending trial. Members may be replaced for reasons of health or for other good reasons, except that no replacement of a member may take place, during a trial, other than by the alternate. If no alternate has been designated, the trial shall be continued to conclusion by the remaining members.

g) The presence of three members of the tribunal or of two members when

authorized pursuant to subsection (*f*) *supra* shall be necessary to constitute a quorum. In the case of tribunals designated under (*c*) above the agreement shall determine the requirements for a quorum.

h) Decisions and judgments, including convictions and sentences, shall be by majority vote of the members. If the votes of the members are equally divided, the presiding member shall declare a mistrial.

Article III

a) Charges against persons to be tried in the tribunals established hereunder shall originate in the Office of the Chief of Counsel for War Crimes, appointed by the Military Governor pursuant to Paragraph 3 of Executive Order Numbered 9679 of the President of the United States dated 16 January 1946. The Chief of Counsel for War Crimes shall determine the persons to be tried by the tribunals and he or his designated representative shall file the indictments with the Secretary General of the tribunals (See Article XIV, *infra*) and shall conduct the prosecution.

b) The Chief of Counsel for War Crimes, when in his judgment it is advisable, may invite one or more United Nations to designate representatives to participate in the prosecution of any case.

Article IV

In order to ensure fair trial for the defendants, the following procedure shall be followed:

a) A defendant shall be furnished, at a reasonable time before his trial, a copy of the indictment and of all documents lodged with the indictment, translated into a language which he understands. The indictment shall state the charges plainly, concisely and with sufficient particulars to inform defendant of the offenses charged.

b) The trial shall be conducted in, or translated into, a language which the defendant understands.

c) A defendant shall have the right to be represented by counsel of his own selection, provided such counsel shall be a person qualified under existing regulations to conduct cases before the courts of defendant's country, or any other person who may be specially authorized by the tribunal. The tribunal shall appoint qualified counsel to represent a defendant who is not represented by counsel of his own selection.

d) Every defendant shall be entitled to be present at his trial except that a defendant may be proceeded against during temporary absences if in the opinion of the tribunal defendant's interests will not thereby be impaired, and except further as provided in Article VI (*c*). The tribunal may also proceed in the absence of any defendant who has applied for and has been granted permission to be absent.

e) A defendant shall have the right through his counsel to present evidence at the trial in support of his defense, and to cross-examine any witness called by the prosecution.

f) A defendant may apply in writing to the tribunal for the production of witnesses or of documents. The application shall state where the witness or document is thought to be located and shall also state the facts to be proved by the witness or the document and the relevancy of such facts to the defense. If the tribunal grants the application, the defendant shall be given such aid in obtaining production of evidence as the tribunal may order.

Article V

The tribunals shall have the power—

a) to summon witnesses to the trial, to require their attendance and testimony and to put questions to them;

b) to interrogate any defendant who takes the stand to testify in his own behalf, or who is called to testify regarding another defendant;

c) to require the production of documents and other evidentiary material;

d) to administer oaths;

e) to appoint officers for the carrying out of any task designated by the tribunals including the taking of evidence on commission;

f) to adopt rules of procedure not inconsistent with this Ordinance. Such rules shall be adopted, and from time to time as necessary, revised by the members of the tribunals or by the committee of presiding judges as provided in Article XIII.

Article VI

The tribunals shall—

a) confine the trial strictly to an expeditious hearing of the issues raised by the charges;

b) take strict measures to prevent any action which will cause unreasonable delay, and rule out irrelevant issues and statements of any kind whatsoever;

c) deal summarily with any contumacy, imposing appropriate punishment, including the exclusion of any defendant or his counsel from some or all further proceedings, but without prejudice to the determination of the charges.

Article VII

The tribunals shall not be bound by technical rules of evidence. They shall adopt and apply to the greatest possible extent expeditious and nontechnical procedure, and shall admit any evidence which they deem to have probative value. Without limiting the foregoing general rules, the following shall be deemed admissible if they appear to the tribunal to contain information of probative value relating to the charges: affidavits, depositions, interrogations, and other statements, diaries, letters, the records, findings, statements and judgments of the military tribunals and the reviewing and confirming authorities of any of the United Nations, and copies of any document or other secondary evidence of the contents of any document, if the original is not readily available or cannot be produced without delay. The tribunal shall afford the opposing party such opportunity to question the authenticity or probative value of such evidence as in the opinion of the tribunal the ends of justice require.

Article VIII

The tribunals may require that they be informed of the nature of any evidence before it is offered so that they may rule upon the relevance thereof.

Article IX

The tribunals shall not require proof of facts of common knowledge but shall take judicial notice thereof. They shall also take judicial notice of official governmental documents and reports of any of the United Nations, including the acts and documents of the committees set up in the various Allied countries for the investigation of war crimes, and the records and findings of military or other tribunals of any of the United Nations.

Article X

The determinations of the International Military Tribunal in the judgments in Case No. 1 that invasions, aggressive acts, aggressive wars, crimes, atrocities or inhumane acts were planned or occurred, shall be binding on the tribunals established hereunder and shall not be questioned except insofar as the participation therein or knowledge thereof by any particular person may be concerned. Statements of the International Military Tribunal in the judgment in Case No. 1 constitute proof of the facts stated, in the absence of substantial new evidence to the contrary.

Article XI

The proceedings at the trial shall take the following course:

a) The tribunal shall inquire of each defendant whether he has received and had an opportunity to read the indictment against him and whether he pleads "guilty" or "not guilty."

b) The prosecution may make an opening statement.

c) The prosecution shall produce its evidence subject to the cross examination of its witnesses.

d) The defense may make an opening statement.

e) The defense shall produce its evidence subject to the cross examination of its witnesses.

f) Such rebutting evidence as may be held by the tribunal to be material may be produced by either the prosecution or the defense.

g) The defense shall address the court.

h) The prosecution shall address the court.

i) Each defendant may make a statement to the tribunal.

j) The tribunal shall deliver judgment and pronounce sentence.

Article XII

A Central Secretariat to assist the tribunals to be appointed hereunder shall be established as soon as practicable. The main office of the Secretariat shall be located in Nuernberg. The Secretariat shall consist of a Secretary General and such assistant secretaries, military officers, clerks, interpreters and other personnel as may be necessary.

Article XIII

The Secretary General shall be appointed by the Military Governor and shall organize and direct the work of the Secretariat. He shall be subject to the supervision of the members of the tribunals, except that when at least three tribunals shall be functioning, the presiding judges of the several tribunals may form the supervisory committee.

Article XIV

The Secretariat shall—

a) Be responsible for the administrative and supply needs of the Secretariat and of the several tribunals.

b) Receive all documents addressed to tribunals.

c) Prepare and recommend uniform rules of procedure, not inconsistent with the provisions of this Ordinance.

d) Secure such information for the tribunals as may be needed for the approval or appointment of defense counsel.

e) Serve as liaison between the prosecution and defense counsel.

f) Arrange for aid to be given defendants and the prosecution in obtaining production of witnesses or evidence as authorized by the tribunals.

g) Be responsible for the preparation of the records of the proceedings before the tribunals.

h) Provide the necessary clerical, reporting and interpretative services to the tribunals and its members, and perform such other duties as may be required for the efficient conduct of the proceedings before the tribunals, or as may be requested by any of the tribunals.

Article XV

The judgments of the tribunals as to the guilt or the innocence of any defendant shall give the reasons on which they are based and shall be final and not subject to review. The sentences imposed may be subject to review as provided in Article XVII, *infra*.

Article XVI

The tribunal shall have the right to impose upon the defendant, upon conviction, such punishment as shall be determined by the tribunal to be just, which may consist of one or more of the penalties provided in Article II, Section 3 of Control Council Law No. 10.

Article XVII

a) Except as provided in (*b*) *infra*, the record of each case shall be forwarded to the Military Governor who shall have the power to mitigate, reduce or otherwise alter the sentence imposed by the tribunal, but may not increase the severity thereof.

b) In cases tried before tribunals authorized by Article II (*c*) the sentence shall be reviewed jointly by the zone commanders of the nations involved, who may mitigate, reduce or otherwise alter the sentence, by majority vote, but may not increase the severity thereof. If only two nations are represented, the sentence may be altered only by the consent of both zone commanders.

Article XVIII

No sentence of death shall be carried into execution unless and until confirmed in writing by the Military Governor. In accordance with Article III, Section 5 of Law No. 10, execution of the death sentence may be deferred by not to exceed one month after such confirmation if there is reason to believe that the testimony of the convicted person may be of value in the investigation and trial of other crimes.

Article XIX

Upon the pronouncement of a death sentence by a tribunal established thereunder and pending confirmation thereof, the condemned will be remanded to the prison or place where he was confined and there be segregated from the other inmates, or be transferred to a more appropriate place of confinement.

Article XX

Upon the confirmation of a sentence of death the Military Governor will issue the necessary orders for carrying out the execution.

Article XXI

Where sentence of confinement for a term of years has been imposed the condemned shall be confined in the manner directed by the tribunal imposing sentence. The place of confinement may be changed from time to time by the Military Governor.

Article XXII

Any property declared to be forfeited or the restitution of which is ordered by a tribunal shall be delivered to the Military Governor, for disposal in accordance with Control Council Law No. 10, Article II (3).

Article XXIII

Any of the duties and functions of the Military Governor provided for herein may be delegated to the Deputy Military Governor. Any of the duties and functions of the Zone Commander provided for herein may be exercised by and in the name of the Military Governor and may be delegated to the Deputy Military Governor.

This Ordinance becomes effective 18 October 1946.

By order of Military Government

Appendix M

MILITARY GOVERNMENT—GERMANY

Ordinance No. 11

Amending Military Government Ordinance No. 7 of 18 October 1946, Entitled "Organization and Powers of Certain Military Tribunals"

Article I

Article V of Ordinance No. 7 is amended by adding thereto a new subdivision to be designated "*g*)", reading as follows:

"*g*) The presiding judges, and, when established, the supervisory committee of presiding judges provided in Article XIII shall assign the cases brought by the Chief of Counsel for War Crimes to the various Military Tribunals for trial."

Article II

Ordinance No. 7 is amended by adding thereto a new article following Article V to be designated Article V–B, reading as follows:

"*a*) A joint session of the Military Tribunals may be called by any of the presiding judges thereof or upon motion, addressed to each of the Tribunals, of the Chief of Counsel for War Crimes or of counsel for any defendant whose interests are affected, to hear argument upon and to review any interlocutory ruling by any of the Military Tribunals on a fundamental or important legal question either substantive or procedural, which ruling is in conflict with or is inconsistent with a prior ruling of another of the Military Tribunals.

"*b*) A joint session of the Military Tribunals may be called in the same manner as provided in subsection *a*) of this Article to hear argument upon and to review conflicting or inconsistent final rulings contained in the decision or judgments of any of the Military Tribunals on a fundamental or important legal question, either substantive or procedural. Any motion with respect to such final ruling shall be filed within ten (10) days following the issuance of decision or judgment.

"*c*) Decisions by joint sessions of the Military Tribunals unless thereafter altered in another joint session, shall be binding upon all the Military Tribunals. In the case of the review of final rulings by joint sessions, the judgments reviewed may be confirmed or remanded for action consistent with the joint decision.

"*d*) The presence of a majority of the members of each Military Tribunal then constituted is required to constitute a quorum.

"*e*) The members of the Military Tribunals shall, before any joint session begins, agree among themselves upon the selection from their number of a member to preside over the joint session.

"*f*) Decisions shall be by majority vote of the members. If the votes of the members are equally divided, the vote of the member presiding over the session shall be decisive."

Article III

Subdivisions *g*) and *h*) of Article XI of Ordinance No. 7 are deleted; subdivision *i*) is relettered "*h*)"; subdivision *j*) is relettered "*i*)"; and a new subdivision, to be designated "*g*)", is added, reading as follows:

"*g*) The prosecution and defense shall address the court in such order as the Tribunal may determine."

This Ordinance becomes effective 17 February 1947

BY ORDER OF MILITARY GOVERNMENT.

Appendix N

HEADQUARTERS

US FORCES, EUROPEAN THEATER

GENERAL ORDERS
NUMBER 301

24 OCTOBER 1946

Office of Chief of Counsel for War Crimes I
Chief Prosecutor II
Announcement of Assignments III

I—*OFFICE OF CHIEF OF COUNSEL FOR WAR CRIMES.* Effective this date, the Office of Chief of Counsel for War Crimes is transferred to the Office of Military Government for Germany (US). The Chief of Counsel for War Crimes will report directly to the Deputy Military Governor and will work in close liaison with the Legal Adviser of the Office of Military Government for Germany and with the Theater Judge Advocate.

II—*CHIEF PROSECUTOR.* Effective this date, the Chief of Counsel for War Crimes will also serve as Chief Prosecutor under the Charter of the International Military Tribunal, established by the Agreement of 8 August 1945.

III—*ANNOUNCEMENT OF ASSIGNMENTS.* Effective this date, Brigadier General Telford Taylor, USA, is announced as Chief of Counsel for War Crimes, in which capacity he will also serve as Chief Prosecutor for the United States under the Charter of the International Military Tribunal, established by the Agreement of 8 August 1945.

BY COMMAND OF GENERAL McNARNEY:

C. R. HUEBNER
Major General, GSC,
Chief of Staff

OFFICIAL:
[Signed] George F. Herbert
GEORGE F. HERBERT
Colonel, AGD
Adjutant General

Appendix O

ORGANIZATION CHART OF OCCWC
OMGUS
Chief of Counsel
PUBLIC RELATIONS
SECRETARY GENERAL
EXECUTIVE COUNSEL*
TRIAL TEAM 1 (I.G. Farben)
TRIAL TEAM 2 (Flick)
TRIAL TEAM 3 (Krupp)
JUSTICE TRIAL TEAM
EVIDENCE DIVISION
MINISTRIES DIVISION
MILITARY DIVISION
SPEC. PROJECTS DIVISION
SS - DIVISION
EXECUTIVE OFFICE
NURNBERG MILITARY POST
ADMINISTRATIVE DIVISION
REPRODUCTION DIVISION
SIGNAL DIVISION
LANGUAGE DIVISION
* Deputy Chiefs of Counsel and Division Chiefs report directly to the Chief of Counsel on matters of legal policy

Appendix P

STRENGTH OF THE NUERNBERG WAR CRIMES AGENCIES, 1946–49

	Civilian	*Military*	*Total*	*German*	*Grand Total*
27 December 1946	546	117	663	333	996
27 June 1947	772	103	875	736	1, 611
1 August 1947	780	117	897	792	1, 689
17 October 1947	746	109	855	919	1, 776
5 January 1948	678	107	785	856	1, 641
2 July 1948	289	43	332	429	761
1 January 1949	150	9	159	248	*407
2 April 1949	77	6	83	161	**244
6 May 1949	51	4	55	136	***191

*Of this total, OCCWC accounted for 130 (51 American and Allied and 79 German) and the Central Secretariat and administrative employees 277 (108 American and Allied and 169 German).

**Of this total, OCCWC accounted for 95 (34 American and Allied and 61 German) and the Central Secretariat and administrative employees 149 (49 American and Allied and 100 German).

***Of this total, OCCWC accounted for 89 (31 American and Allied and 58 German) and the Central Secretariat and administrative employees 102 (24 American and Allied and 78 German).

Appendix Q

LIST OF DEFENSE COUNSEL IN THE TWELVE NUERNBERG TRIALS UNDER CONTROL COUNCIL LAW NO. 10

This appendix contains an alphabetical list of defense counsel in the Nuernberg trials under Control Council Law No. 10, including both main counsel and assistant counsel. It is based upon records in the office of the Secretary General of the Military Tribunals and is believed to be nearly complete, although no doubt there are a few omissions.

Following the alphabetical list, the defense counsel are listed according to the defendants whom they represented in the 12 cases. The cases are listed by number, and within each case the defendants appear in alphabetical order.

In the list of defense counsel which is compiled according to the names of the defendants they represented, other information concerning individual counsel is given according to the following legend:

1. Place and date of birth.
2. Present address.
3. Universities attended.
4. Professional titles, degrees, etc.
5. Membership in the National Socialist Party or affiliated organizations (such as the SA and the SS).
6. Category determined in denazification proceedings, if such have been held.
7. Law practice or other activities prior to appearance in Nuernberg trials.

The designations "Referendar" and "Assessor" which frequently appear opposite No. 4 in the legend refer to the lower grades in the German juristic hierarchy, earned by young attorneys by passing state examinations.

The classifications of the denazification program (given opposite No. 6 of the legend) are—

I. Major Offender
II. Offender
III. Lesser Offender
IV. Follower
V. Person Exonerated

LIST OF DEFENSE COUNSEL

Name	*Name*
ACHENBACH, Ernst	BEHLING, Dr. Kurt
ALT, Dr. Wolfgang	BEHRINGER, Dr. Alfred
ALTSTOETTER, Dr. Ludwig	BEIER, Dr. Walter
ARNDT, Dr. Karl	BELZER, Dr. Eduard
ASCHENAUER, Dr. Rudolf	BERGLER, Dr. Erich
BACHEM, Dr. Walter	BERGMANN, Dr. Joachim
BALLAS, Dr. Walter	BERGOLD, Dr. Friedrich
BECKER, Hellmut	BERNDT, Dr. Erich

Name

BLUME, Dr. Rudolf
BOEHM, Georg
BOETTCHER, Dr. Conrad
BORNEMANN, Karl
BOTHE, Dr. Helmut
BRAUN, Sigismund, von
BRAUNE, Dr. Ernst
BRENNER, Alfred
BRIEGER, Dr. Richard
BROSS, Werner
DEHNER, Walter
DIX, Dr. Hellmuth
DIX, Dr. Rudolf
DOETZER, Gerda
DOETZER, Dr. Karl
DOHME, Johannes
DUERR, Dr. Helmut
DURCHHOLZ, Dr. Ernst
EISEMANN, Dr. Adolf
EISENBLAETTER, Helmut
EISOLD, Dr. Heinrich
FEHSENBECKER, Dr. Julius
FICHT, Dr. Oskar
FLAECHSNER, Dr. Hans
FLEMMING, Dr. Fritz
FRITSCH, Dr. Stefan
FRITZ, Dr. Hans
FROESCHMANN, Dr. Georg
FROHWEIN, Dr. Friedrich
GATHER, Dr. Gernot
GAWLIK, Dr. Hans
GEISSELER, Dr. Guenter
GEINTNER, Herbert
GICK, Dr. Karl
GIERL, Dr. Georg
GIERLICHS, Hanns
GIESE, Hans Richard
GOLLNICK, Dr. Kurt
GOMBEL, Dr. Elisabeth
GROSS, Walter
GRUBE, Dr. Heinrich
GRUENEWALD, Dr. Otto
HAACK, Erwin
HAEFELE, Karl Heinz
HAENSEL, Dr. Carl
HAESELER, Karl
HARTMANN, Dr. Kurt
HASSFUERTHER, Karl
HEIDKAEMPER, Otto
HEIM, Dr. Willi
HEINKE, Dr. Erhard
HEINTZELER, Dr. Wolfgang
HELM, Dr. Kurt
HENDUS, Heinrich

Name

HENZE, Dr. Helmut
HERRMANN, Paul
HESSE, Ernst
HINDEMITH, Dr. Guenther
HOFFMANN, Dr. Karl
HUETTL, Adolf
JAEGER, Dr. Karl
JAGWITZ, Dr. Oskar von
JANICKI, Dr. Hubertus
JOPPICH, Dr. Adalbert
JUNG, Dr. Hans Joachim
KAUFFMANN, Dr. Kurt
KELLER, Dr. Rupprecht von
KLAS, Adolf
KLEFISCH, Dr. Theodore
KLINNERT, Dr. Gerhard
KLUG, Dr. Heinrich
KOCH, Dr. Justus
KOESSL, Dr. Josef
KOHR, Ludwig
KRAFT von DELLMENSINGEN, Dr. Leopold
KRANZBUEHLER, Otto
KRAUSE, Max
KROEN, Dr. Erna
KUBUSCHOK, Dr. Egon
KUEHN, Dr. Rudolf
KUROWSKI-SCHMITZ, Dr. Aenne
LATERNSER, Dr. Hans
LAUE, Dr. Wolfgang
LEHMANN, Dr. Gabriele
LEIS, Dr. Ferdinand
LEVERKUEHN, Dr. Paul
LIER, Hans Wilhelm
LINGENBERG, Dr. Joachim
LINK, Heinrich
LIPPE, Dr. Viktor, von der
LUCHT, Dr. Harold
LUMMERT, Dr. Guenther
MAAS, Dr. Wilhelm
MAGEE, Waren E. (United States citizen)
MANDRY, Dr. Kurt
MARX, Dr. Hanns
MASCHKE, Dr. Hermann M.
MATHY, Klaus
MAYER, Dr. Erich
MAYER, Dr. Joseph
MECKEL, Hans
MENZEL, Dr. Georg
MERKEL, Hans
MERKEL, Dr. Rudolf
METZLER, Dr. Wolfram von
MEYER, Dr. Rudolf

Name

MILCH, Dr. Werner
MINTZEL, Kurt
MOELLER, Otto
MUELLER, Dr. Hermann
MUELLER, Karl
MUELLER, Dr. Rolf W.
MUELLER-TORGOW, Dr. Heinz
NATH, Dr. Herbert
NATH-SCHRIEBER, Dr. Agnes
NAUMANN, Dr. Fritz
NELTE, Dr. Otto
NIEMANN, Dr. Josef
OEHLRICH, Dr. Conrad
ORTH, Dr. Hermann
PAPEN, Franz von
PATZIG, Hans Guenther
PELCKMANN, Horst
PESCHKE, Dr. Kurt
POHLE, Dr. Wolfgang
PRACHT, Dr. Karl
PRIBILLA, Dr. Hans
PRIBILLA, Dr. Karl
RATZ, Dr. Paul
RAUSCHENBACH, Dr. Gerhard
REITZENSTEIN, Otto
RENTSCH, Heinrich
RICHTHOFEN, Prof. Dr. Bolko von
RIEDIGER, Dr. Fritz
ROBINSON, Joseph S. (United States citizen)
ROSPATT, Dr. Heinrich von
SAUTER, Dr. Fritz
SHAEFER, Dr. Adolf
SCHILF, Dr. Alfred
SCHMIDT, Dr. Johannes
SCHMIDT, Dr. Rudolf
SCHMIDT, Dr. Wilhelm
SCHMIDT-LEICHNER, Dr. Erich
SCHMIEDEN, Dr. Werner von
SCHMITT, Dr. Walter
SCHRAMM, Dr. Hugo
SCHUBERT, Dr. Werner
SCHULTE, Dr. Ernst

Name

SCHWARZ, Dr. Alfred
SCHWARZ, Dr. Otfried
SEIDL, Dr. Alfred
SERAPHIM, Dr. Hans-Gunther
SERVATIUS, Dr. Robert
SEUPIN, Dr. Hans
SIEMERS, Dr. Walter
SILCHER, Dr. Friedrich
STACKELBERG, Dr. Curt von
STEIN, Dr. Bolko von
STEINBAUER, Dr. Gustav
STORKEBAUM, Dr. Rupprecht
STUEBINGER, Dr. Oskar
SURHOLT, Dr. Hans
TEMPLER, Dr. Alfons
THEOBALD, Wolfgang
THIELE-FREDERSDORF, Herbert
TIPP, Dr. Edmund
TRABANDT, Heinz
TRENCK, Gisela von der
TUERCK, Dr. Christian
ULMER, Hermann
VINASSA, Dr. Walter (Swiss Citizen)
VOELKL, Dr. Konrad
VOGEL, Gottfried
VORWERK, Dr. Bernhard
WAGNER, Dr. Friedrich Wilhelm
WAHL, Prof. Dr. Eduard
WALTER, Dr. Hermann
WANDSCHNEIDER, Dr. Erich
WECKER, Dr. Fritz
WEISGERBER, Dr. Josef
WEIZ, Dr. Gerhart
WEIZSAECKER, Richard von
WENDLAND, Guenther
WEYER, Dr. Carl
WEISSMATH, Paul
WILHELMI, Gerhard
WILLE, Dr. Siegfried
WOLF, Heinz
WOLFF, Dr. Georg
ZAPF, Dr. Ewald
ZWEHL, Dr. Hans von

BECKER-FREYSENG, HERMANN

MARX, Dr. Hanns—Main Counsel
1. 1892, Nuernberg
2. Schwaig nr. Nuernberg
3. Universities of Erlangen and Munich
4. Referendar, Assessor
5. NSDAP 1933–1935
6. Pending
7. Law Practice, Nuernberg

DEHNER, Walter—Assistant
1. 1923, Regensburg
2. Wiesbaden
3.
4. Referendar
5. NSDAP 1944–1945
6. Youth Amnesty
7. No prior practice

BEIGLBOECK, WILHELM

STEINBAUER, Dr. Gustav—Main Counsel
1. 1889, Vienna
2. Vienna
3. Vienna University
4. Referendar, Assessor, Doctor of Jurisprudence
5. No Party affiliation
6.
7. Law practice, Vienna

BLOME, KURT

SAUTER, Dr. Fritz—Main Counsel
1. 1884, Neuhof
2. Munich
3. University of Munich
4. Referendar, Assessor, Doctor of Jurisprudence
5. NSDAP 1933–1945; NSKE 1941–1945
6. Category IV
7. Law practice, Munich

BRACK, VIKTOR

FROESCHMANN, Dr. Georg—Main Counsel
1. 1882, Nuernberg
2. Nuernberg
3. Universities of Erlangen and Tuebingen
4. Doctor of Jurisprudence, Referendar, Assessor
5. NSDAP 1937–1945; SA 1934–1945
6. Category III
7. Law practice, Nuernberg

BRANDT, KARL

SERVATIUS, Dr. Robert—Main Counsel
1. 1894, Cologne
2. Cologne
3. Universities of Bonn, Berlin, and Munich
4. Referendar, Assessor, Doctor of Jurisprudence
5. No Party affiliation
6.
7. Law practice, Cologne

	SCHMIDT, Dr. Rudolf—Assistant 1. 1923 2. Nuernberg 3. Erlangen University 4. Student 5. 6. 7. Student
BRANDT, RUDOLF	KAUFFMANN, Dr. Kurt—Main Counsel 1. 1902, Wiesbaden 2. Wiesbaden 3. Universities of Frankfurt and Erlangen 4. Referendar, Assessor, Doctor of Jurisprudence 5. NSDAP 1933–1945 6. Category V 7. Law practice, Wiesbaden
FISCHER, FRITZ	SEIDL, Dr. Alfred—Main Counsel 1. 1911, Munich 2. Munich 3. University of Munich 4. Referendar, Assessor, Doctor of Jurisprudence and Graduate Economist 5. NSDAP 1937–1945; Member of Student Movement of SA 6. Christmas Amnesty 7. Law practice, Munich GIERL, Dr. Georg—Assistant 1. 1910, Nuernberg 2. Hammelburg 3. Universities of Erlangen and Munich 4. Referendar, Assessor, Doctor of Jurisprudence 5. NSDAP 1933–1945 6. Category IV 7. Judge, Nuernberg
GEBHARDT, KARL	SEIDL, Dr. Alfred—Main Counsel (See defendant Fritz Fischer, *supra*, for biographical data) GIERL, Dr. Georg—Assistant (See defendant Fritz Fischer, *supra*, for biographical data)
GENZKEN, KARL	MERKEL, Dr. Rudolf—Main Counsel 1. 1905, Wuerzburg 2. Nuernberg 3. University of Wuerzburg 4. Referendar, Assessor, Doctor of Jurisprudence 5. SS Rottenfuehrer 1943–1945 6. 7. Law practice, Nuernberg BRENNER, Alfred—Assistant 1. 1907, Mauth, Bavaria 2. Nuernberg 3. Universities of Erlangen and Munich

4. Referendar, Assessor
5. NSDAP 1937–1945
6. Category IV
7. Judge, Nuernberg

HANDLOSER, SIEGFRIED

NELTE, Dr. Otto—Main Counsel
1. 1887, Duesseldorf
2. Siegburg
3. Universities of Heidelberg and Bonn
4. Referendar, Assessor, Doctor of Jurisprudence
5. NSDAP 1933–1945
6. Category IV
7. Law practice, Cologne

HOVEN, WALDEMAR

GAWLIK, Dr. Hans—Main Counsel
1. 1904, Breslau
2. Oldenburg
3. University of Breslau
4. Doctor of Law
5. NSDAP 1933–1945
6. Category IV
7. Public prosecutor, Breslau

KLINNERT, Dr. Gerhard—Assistant
1. 1904, Beuthen, Upper Silesia
2. Geroldsgruen, Kreis Naila/Upper Frankonia
3. University of Breslau
4. Referendar, Assessor, Doctor of Jurisprudence
5. NSDAP 1937–1945; SA 1933–1940
6. Category IV
7. Senior judge, Beuthen, Silesia

MRUGOWSKY, JOACHIM

FLEMMING, Dr. Fritz—Main Counsel
1. 1888, Potsdam
2. Bleckede, nr. Lueneburg
3. University of Berlin
4. Referendar, Assessor, Doctor of Jurisprudence
5. No Party affiliation
6.
7. Law practice, Berlin

OBERHEUSER, HERTA

SEIDL, Dr. Alfred—Main Counsel
(See defendant Fritz Fischer, *supra*, for biographical data)

GIERL, Dr. Georg—Assistant
(See defendant Fritz Fischer, *supra*, for biographical data)

POKORNY, ADOLF

HOFFMANN, Dr. Karl—Main Counsel
1. 1908, Berlin
2. Nuernberg
3. University of Berlin
4. Referendar, Assessor, Doctor of Jurisprudence
5. NSDAP 1933–1941
6. Category IV
7. Law practice, Berlin

SERAPHIM, Dr. Hans-Gunther—Assistant
1. 1903, Koenigsberg
2. Herberhausen nr. Goettingen
3. Universities of Koenigsberg and Goettingen
4. Doctor of Philosophy
5. No Party affiliation
6.
7. Librarian

POPPENDICK, HELMUT

BOEHM, Georg—Main Counsel
1. 1900, Kronach
2. Nuernberg
3. University of Erlangen
4. Referendar, Assessor
5. No Party affiliation
6.
7. Legal practice, Nuernberg

DUERR, Helmut—Assistant
1. 1920, Nuernberg
2. Nuernberg
3. University of Erlangen
4. Referendar, Assessor
5. NSDAP 1940–1945
6. Youth Amnesty, 1946
7. No prior practice

ROMBERG, HANS WOLFGANG

VORWERK, Dr. Bernhard—Main Counsel
1. 1911, Waddersloh
2. Braunschweig
3. Universities of Geneva, London, and Munich
4. Referendar, Assessor, Doctor of Jurisprudence
5. NSDAP 1941–1945
6. Unknown
7. Legal practice in Braunschweig

ROSE, GERHARD

FRITZ, Dr. Heinz—Main Counsel
1. 1906, Augsburg
2. Munich
3. University of Munich
4. Referendar, Assessor, Doctor of Jurisprudence
5. NSDAP 1937–1945
6. Pending
7. Law practice, Munich

ROSTOCK, PAUL

PRIBILLA, Dr. Hans—Main Counsel
1. 1910, Cologne
2. Coburg
3. Universities of Freiburg, Munich, and Cologne
4. Referendar, Assessor, Doctor of Jurisprudence
5. NSDAP 1935–1945; SNKK 1937–1945
6. Category IV
7. Legal adviser, Kloeckner Works

RUFF, SIEGFRIED	SAUTER, Dr. Fritz—Main Counsel (See defendant Kurt Blome, *supra*, for biographical data)
SCHAEFER, KONRAD	PELCKMANN, Horst—Main Counsel 1. 1904, Berlin 2. Wiesbaden 3. University of Berlin 4. Referendar, Assessor, Doctor of Jurisprudence 5. No Party affiliation 6. 7. Legal practice, Berlin
SCHROEDER, OSKAR	MARX, Dr. Hanns—Main Counsel (See defendant Hermann Becker-Freyseng, *supra*, for biographical data) DEHNER, Walter—Assistant (See defendant Hermann Becker-Freyseng, *supra*, for biographical data)
SIEVERS, WOLFRAM	WEISGERBER, Dr. Josef—Main Counsel 1. 1893, Metz 2. Nuernberg 3. Universities of Munich and Wurzburg 4. Referendar, Assessor, Doctor of Jurisprudence, Doctor of National Economics 5. NSDAP 1940–1945; Staff Sgt SA 1931–1934; Stahlhelm 1931 6. Category IV 7. Law practice, Nuernberg BERGLER, Dr. Erich—Assistant 1. 1895, Muelhausen 2. Nuernberg 3. University of Erlangen 4. Referendar, Assessor, Doctor of Jurisprudence 5. NSDAP 1937–1945 6. Category IV 7. Judge, Nuernberg
WELTZ, GEORG AUGUST	WILLIE, Dr. Siegfried—Main Counsel 1. 1884, Memmingen 2. Munich 3. Universities of Erlangen and Munich 4. Referendar, Assessor, Doctor of Jurisprudence 5. NSDAP Candidate 1933 6. Category IV 7. Law practice, Munich

CASE 2—TRIBUNAL II—MILCH

MILCH, ERHARD	BERGOLD, Dr. Friedrich—Main Counsel 1. 1899, Nuernberg 2. Nuernberg 3. University of Wurzburg 4. Referendar, Assessor, Doctor of Jurisprudence 5. No Party affiliation

6.
7. Law practice, Nuernberg

MILCH, Dr. Werner—Assistant
1. 1903, Wilhelmshaven
2. Hagen, Westf.
3. University of Berlin
4. Referendar, Assessor, Doctor of Jurisprudence
5. NSDAP 1937–1945
6. Category V
7. Captain, Germany army

CASE 3—TRIBUNAL III—JUSTICE

ALTSTOETTER, JOSEF

ORTH, Dr. Hermann—Main Counsel
1. 1903, Speyer a/Rh
2. Nuernberg
3. Universities of Wurzburg and Speyer
4. Referendar, Assessor
5. NSDAP 1938–1945
6. Category IV
7. Attorney, tax expert, Nuernberg

ALTSTOETTER, Dr. Ludwig—Assistant
1. 1897, Aidenboch
2. Banberg
3. University of Munich
4. Referendar, Assessor
5. NSDAP 1939–1945
6. Category IV
7. Notary, Bamberg

VON AMMON, WILHELM

KUBUSCHOK, Dr. Egon—Main Counsel
1. 1902, Rosenberg, Upper Silesia
2. Honnef/Rhine
3. University of Breslau
4. Referendar, Assessor, Doctor of Jurisprudence
5. No Party affiliation
6.
7. Law practice, Breslau

JANICKI, Dr. Hubertus—Assistant
1. 1914, Konradshoeh, Silesia
2. Ochtrup, Westfalia
3. Universities of Breslau, Munich, Berlin, and Goettingen
4. Referendar, Assessor, Doctor of Jurisprudence
5. No Party affiliation
6.
7.

BARNICKEL, PAUL

TIPP, Dr. Edmund—Main Counsel
1. 1909, Fuerth
2. Fuerth
3. Universities of Erlangen and Munich
4. Referendar, Assessor, Doctor of Jurisprudence

5. NSDAP 1937–1945
6. Category IV
7. Law practice, Fuerth

SCHMIDT, Rudolf—Assistant

(See defendant Karl Brandt, *supra*, for biographical data)

CUHORST, HERMANN

BRIEGER, Dr. Richard—Main Counsel

1. 1900, Berlin
2. Bayreuth
3. Berlin
4. Referendar, Assessor, Doctor of Jurisprudence
5. Inquiries negative
6.
7. Economic Expert

HASSFUERTHER, Karl—Assistant

1. 1900, Hof, Bavaria
2. Bayreuth
3. Universities of Erlangen, Munich, and Heidelberg
4. Referendar, Assessor
5. NSDAP 1933–1944; Zellenleiter 1941–1942
6. Christmas Amnesty
7. Assessor, Amtsgeriecht, Ansbach

ENGERT, KARL

MARX, Hanns—Main Counsel

(See defendant Hermann Becker-Freyseng, *supra*, for biographical data)

JOEL, GUENTHER

HAENSEL, Dr. Carl—Main Counsel

1. 1889, Frankfurt
2. Ueberlingen
3. Universities of Lausanne, Berlin, and Marburg
4. Referendar, Assessor, Doctor of Jurisprudence
5. No Party affiliation
6. Category V
7. Attorney, Court of Appeals, Nuernberg

THIELE-FREDERSDORF, Hebert—Assistant

1. 1909, Eisenach
2. Munich
3. Universities of Heidelberg, Munich, and Berlin
4. Referendar, Assessor
5. No Party affiliation
6.
7. Legal Adviser, German Air Ministries

KLEMM, HERBERT

SCHILF, Dr. Alfred—Main Counsel

1. 1901, Halle/Saale
2. Ansbach
3. Universities of Heidelberg, Freiburg, Munich, and Leipzig
4. Referendar, Assessor, Doctor of Jurisprudence

5. NSDAP 1937–1945
6. Category V
7. Law practice, Dresden

HEINKE, Dr. Erhard—Assistant
1. 1913, Breslau
2. Nuernberg
3. University of Breslau
4. Referendar, Assessor
5. NSDAP 1937–1945
6. Category IV
7. Public prosecutor, Breslau, Kattowitz, and Berlin

LAUTZ, ERNST

GRUBE, Dr. Heinrich—Main Counsel
1. 1908, Nuernberg
2. Nuernberg
3. University of Erlangen
4. Referendar, Assessor, Doctor of Jurisprudence
5. NSDAP 1933–1945; SS 1934–1945
6. Category IV
7. Legal Advisor to Civil Service

METTGENBERG, WOLFGANG

SCHILF, Dr. Alfred—Main Counsel
(See defendant Herbert Klemm, *supra*, for biographical data)

HEINKE, Dr. Erhard—Assistant
(See defendant Herbert Klemm, *supra*, for biographical data)

NEBELUNG, GUENTHER

DOETZER, Dr. Karl—Main Counsel
1. 1907, Braunschweig
2. Braunschweig
3. Universities Berlin and Marburg
4. Referendar, Assessor, Doctor of Jurisprudence
5. NSDAP 1932–1945; General SS 1933–1936
6. Category IV
7. Judge, Oberlandesgericht

DOETZER, Gerda—Assistant
1. 1919, Berlin
2. Braunschweig
3.
4.
5. No Party affiliation
6.
7. Scientific Assistant

OESCHEY, RUDOLF

SCHUBERT, Dr. Werner—Main Counsel
1. 1904, Berlin
2. Augsburg
3. Universities of Freiburg, Geneva, and Berlin
4. Referendar, Assessor, Doctor of Jurisprudence
5. NSDAP 1937–1945
6. Category IV

7. Law practice

PRIBILLA, Dr. Karl—Assistant

1. 1918, Cologne
2. Cologne
3. Universities of Cologne and Munich
4. Referendar, Assessor
5. NSDAP 1942–1945
6.
7. No prior practice

PETERSEN, HANS

ASCHENAUER, Dr. Rudolf—Main Counsel

1. 1913, Regensburg
2. Nuernberg
3. University of Munich
4. Referendar, Assessor
5. NSDAP 1937–1945
6. Category V
7. No prior practice

SCHWARZ, Dr. Otfried—Assistant

1. 1912, Ansbach
2. Fuerth
3. Universities of Cologne and Munich
4. Referendar
5. NSDAP 1937–1945
6. Category IV
7. No prior practice

ROTHAUG, OSWALD

KOESSL, Dr. Josef—Main Counsel

1. 1910, Freyung, Bavaria
2. Traunstein, Upper Bavaria
3. University of Munich
4. Referendar, Assessor
5. NSDAP 1931—1945; Major in General SS 1940–1945; Major in SA 1930–1937
6. Category IV
7. Professional soldier

HUETTL, Adolf—Assistant

1.
2. Nuernberg
3. University of Erlangen
4. Student
5.
6.
7. No prior practice

ROTHENBERGER, CURT

WANDSCHNEIDER, Dr. Erich—Main Counsel

1. 1899, Hamburg
2. Hamburg, Volksdorf
3. Universities of Freiburg and Hamburg
4. Referendar, Assessor
5. NSDAP 1937–1945
6. Category V
7. Law practice, Nuernberg

	BOTHE, Dr. Helmut—Assistant 1. 1911, Leipzig 2. Hamburg 3. Universities of Munich, Heidelber, Paris, Leipzig, and Hamburg 4. Referendar, Assessor, Doctor of Jurisprudence 5. No Party affiliation 6. 7. Legal Advisor, Mineral Oil Industry
SCHLEGELBERGER, FRANZ	KUBUSCHOK, Dr. Egon—Main Counsel (See defendant Wilhelm von Ammon, *supra*, for biographical data) JANICKI, Dr. Hubertus—Assistant (See defendant Wilhelm von Ammon, *supra*, for biographical data)

CASE 4—TRIBUNAL II—POHL

BAIER, HANS	FRITSCH, Dr. Stefan—Main Counsel 1. 1907, Meseritz, Upper Silesia 2. Erling-Andechs, Upper Bavaria 3. Universities of Cologne, Berlin, and Breslau 4. Referendar, Assessor 5. NSDAP 1940–1945 6. Category IV 7. Law practice, Breslau JAGWITZ, Dr. Oskar von—Assistant 1. 1909, Glogau, Silesia 2. Coburg 3. Universities of Berlin, Vienna, Paris, and Breslau 4. Referendar, Assessor, Doctor of Jurisprudence 5. No Party affiliation 6. 7. Law practice
BOBERMIN, HANS	GAWLIK, Dr. Hans—Main Counsel (See defendant Waldemar Hoven, *supra*, for biographical data) KLINNERT, Dr. Gerhard—Assistant (See defendant Waldemar Hoven, *supra*, for biographical data)
EIRENSCHMALZ, FRANZ	STEIN, Dr. Bolko von—Main Counsel 1. 1898, Breslau 2. Nuernberg 3. University of Breslau 4. Referendar, Assessor, Doctor of Jurisprudence 5. NSDAP 1933–1943 6. Category IV 7. Law practice in Breslau

FANSLAU, HEINZ KARL

STACKELBERG, Dr. Curt von—Main Counsel

1. 1910, St. Petersburg, Russia
2. Bad Reichenhall
3. Universities of Munich and Wurzburg
4. Referendar, Assessor
5. No Party affiliation
6. Category V
7. Law practice, Berlin

FRANK, AUGUST

RAUSCHENBACH, Dr. Gerhard—Main Counsel

1. 1910, Dresden
2. Luebeck
3. Universities of Rostock, Berlin, and Leipzig
4. Referendar, Assessor
5. NSDAP 1937–1945
6. Category IV
7. Judge, Leipzig

HOHBERG, HANS

SCHULTE, Dr. Ernst—Main Counsel

1. 1903, Iserlohn, Bavaria
2. Iserlohn
3. Universities of Marburg and Cologne
4. Referendar, Assessor, Doctor of Jurisprudence
5. NSDAP 1933–1945; SA 1937–1945; Circuit Court Party Judge
6. Category III
7. Attorney, Notary Public

MAAS, Dr. Wilhelm—Assistant

1. 1910, Nuernberg
2. Bamberg
3. Universities of Munich, Wurzburg
4. Referendar, Assessor
5. NSDAP 1937–1945
6. Category IV
7. Judge, Nuernberg

KIEFER, MAX

MAYER, Dr. Erich—Main Counsel

1. 1908, Aschaffenburg
2. Ansbach, Bavaria
3. Universities of Wurzburg, Munich, and Cologne
4. Referendar, Assessor, Doctor of Jurisprudence
5. NSDAP 1937–1945; Blockleiter 1938–1942
6. Christmas Amnesty 1947
7. Public Prosecutor, Ansbach

LEIS, Dr. Ferdinand—Assistant

1. 1910, Munich
2. Windsheim
3. Universities of Munich and Erlangen
4. Referendar, Assessor, Doctor of Jurisprudence
5. NSDAP 1937–1945

	6. Category IV 7. Civil Servant
KLEIN, HORST	BERGOLD, Dr. Friedrich—Main Counsel (See defendant Erhard Milch, *supra*, for biographical data) FICHT, Dr. Oskar—Assistant 1. 1910, Nuernberg 2. Nuernberg 3. Universities of Erlangen and Munich 4. Referendar, Assessor 5. NSDAP 1937–1945 6. Category IV 7. Civil Servant, Nuernberg
LOERNER, GEORG	HAENSEL, Dr. Carl—Main Counsel (See defendant Guenther Joel, *supra*, for biographical data)
LOERNER, HANS	RAUSCHENBACH, Dr. Gerhard—Main Counsel (See defendant August Frank, *supra*, for biographical data)
MUMMENTHEY, KARL	FROESCHMANN, Dr. Georg—Main Counsel (See defendant Viktor Brack, *supra*, for biographical data) PRACHT, Dr. Karl—Assistant 1. 1912, Nuernberg 2. Nuernberg 3. Universities of Erlangen, Munich, Wurzburg; and School of Foreign Languages, Hamburg 4. Referendar, Doctor of Jurisprudence 5. NSDAP 1933–1945; Hitler Jugend 1934–1937 6. Category IV 7. Department Head, German Chamber of Commerce, Zurich
POHL, OSWALD	SEIDL, Dr. Alfred—Main Counsel (See defendant Fritz Fischer, *supra*, for biographical data) GIERL, Georg—Assistant (See defendant Fritz Fischer, *supra*, for biographical data)
POOK, HERMANN	RATZ, Dr. Paul—Main Counsel 1. 1898, Herrieden, Bavaria 2. Nuernberg 3. Universities of Munich and Wurzburg 4. Referendar, Assessor, Doctor of Jurisprudence 5. NSDAP 1937–1945 6. Category IV 7. Judge, Oberlandesgericht, Nuernberg
SCHEIDE, RUDOLF	HOFFMANN, Dr. Karl—Main Counsel (See defendant Adolf Pokorny, *supra*, for biographical data)

SOMMER, KARL	BELZER, Dr. Eduard—Main Counsel 1. 1896, Petersberg/Rheimpfalz 2. Nuernberg 3. Universities of Munich, Heidelberg, and Wurzburg 4. Referendar, Assessor 5. No Party affiliation 6. 7. Judge, Nuernberg MAYER, Dr. Joseph—Assistant 1. 1905, Ingolstadt 2. Nuernberg 3. University of Munich 4. Referendar, Assessor 5. NSDAP 1932–1945 6. Category IV 7. Judge, Nuernberg
TSCHENTSCHER, ERWIN	PRIBILLA, Dr. Hans—Main Counsel (See defendant Paul Rostock, *supra*, for biographical data)
VOGT, JOSEF	SCHMIDT, Dr. Wilhelm—Main Assistant 1. 1906, Nuernberg 2. Nuernberg 3. University of Erlangen 4. Referendar, Assessor, Doctor of Jurisprudence 5. NSDAP 1937–1945 6. Category IV 7. Judge, Nuernberg
VOLK, LEO	GAWLIK, Dr. Hans—Main Counsel (See defendant Waldemar Hoven, *supra*, for biographical data) KLINNERT, Gerhard—Assistant (See defendant Waldemar Hoven, *supra*, for biographical data)

CASE 5—TRIBUNAL IV—FLICK

BURKART, ODILO	KRANZBUEHLER, Otto—Main Counsel 1. 1907, Berlin 2. Luebeck 3. Universities of Freiburg, Geneva, Paris, Kiel, and Berlin 4. Referendar, Assessor 5. 6. 7. Fleet Judge in German navy GEISSELER, Dr. Guenter—Assistant 1. 1909, Goesen, Prussia 2. Bonn/Rhine 3. Universities Bonn and Munich 4. Defendant, Assessor, Doctor of Law Jurisprudence 5. NSDAP 1933–1945; SA 1933–1934 6. 7. Official at Reich Ministry of Justice, Berlin

FLICK, FRIEDRICH	DIX, Dr. Rudolf—Main Counsel 1. 1884, Leipzig 2. Frankfurt/Main 3. University of Zurich, Munich, and Leipzig 4. Referendar, Assessor, Doctor of Jurisprudence 5. No Party affiliation 6. 7. Legal practice, Berlin; President, German Lawyers' Association 1922–1934
KALETSCH, KONRAD	NATH, Dr. Herbert—Main Counsel 1. 1903, Berlin 2. Prien/Chiemesee 3. Universities of Berlin and Marburg 4. Referendar, Assessor, Doctor of Jurisprudence 5. No Party affiliation 6. 7. Law practice, Berlin NATH-SCHREIBER, Dr. Agnes—Assistant 1. 1904, Berlin 2. Priem/Chiemesee 3. University of Cologne 4. Referendar, Assessor, Doctor of Jurisprudence 5. No Party affiliation 6. 7. Law practice, Berlin
STEINBRINCK, OTTO	FLAECHSNER, Dr. Hans—Main Counsel 1. 1896, Berlin 2. Berlin 3. Universities Tuebingen and Berlin 4. Doctor of Jurisprudence 5. No Party affiliation 6. 7. Law practice, Berlin PAPEN, Franz von—Assistant 1. 1911, Potsdam 2. Nuernberg 3. Universities of Muenster; Berlin; and Georgetown, Washington, D. C. 4. Referendar 5. No Party affiliation 6. 7. Commercial activities
TERBERGER, HERMANN	PELCKMANN, Horst—Main Counsel (See defendant Konrad Schaefer, *supra*, for biographical data) SCHMIDT-LEICHNER, Dr. Erich—Assistant 1. 1910, Berlin 2. Berlin 3. University of Berlin

4. Referendar, Assessor, Doctor of Jurisprudence
5. NSDAP 1942–1945
6. Category IV
7. Attorney and judge; official in Reich Ministry of Justice

WEISS, BERNARD

SIEMERS, Dr. Walter—Main Counsel
1. 1902, Hamburg
2. Hamburg
3. Universities of Tuebingen, Marburg, and Hamburg
4. Referendar, Assessor, Doctor of Jurisprudence
5. No Party affiliation
6.
7. Law practice, Hamburg

WECKER, Dr. Fritz—Assistant
1. 1906, Brussels
2. Duesseldorf
3. Universities of Bonn and Munich
4. Referendar, Assessor
5. NSDAP 1937–1945
6. Category V
7. Law practice, Duesseldorf; Legal Advisor to Vereinigte Stahlwerke

CASE 6—TRIBUNAL VI—I. G. FARBEN

General Staff—on Behalf of All Defendants

SCHRAMM, Dr. Hugo—Main Counsel
1. 1892, Duisburg
2. Leverkusen
3. University of Duisburg
4. Referendar, Assessor, Doctor of Jurisprudence
5. No Party affiliation
6.
7. Legal Consultant, I. G. Farben

JOPPICH, Dr. Adalbert—Assistant
1. 1902, Nieder-Hermsdorf
2. Emden
3. Universities of Berlin, Innsbruck, and Wurzburg
4. Referendar, Assessor, Doctor of Jurisprudence
5. NSDAP 1933–1945; SS 1933–1945, Oberscherfuehrer
6. Category IV
7. Judge, Berlin

NAUMANN, Dr. Fritz—Main Counsel
1. 1913, Berlin
2. Ludwigshafen
3. Technical College, Berlin and Geneva
4. Graduate engineer, Doctor of Engineering

5. No Party affiliation
6.
7. Plant Engineer in the I. G. Leuna Works

HAESELER, KARL—Assistant
1. 1902, Dortmund
2. Krefeld
3. Technical High School, Munich and Karlsruhe
4. Diploma as Engineer
5. No Party affiliation
6.
7. Engineer, I. G. Farben

NIEMANN, Dr. Josef—Main Counsel
1. 1914, Liegnitz
2. Marl
3. Technical College, Hannover and Munich
4. Engineer Diploma, Doctor of Engineering
5. No Party affiliation
6.
7. Plant Engineer, I. G. Farben A. G, Auschwitz

HAEFELE, Karl Heinz—Assistant
1. 1914, Liegnitz
2. Marl/Westf. nr. Rocklinghausen
3. Technical High Schools, Hannover and Munich
4. Diploma Engineer
5. No Party affiliation
6.
7. Engineer, I. G. Farben

WALTER, Dr. Hermann—Main Counsel
1. 1905, Ludwigschafen
2. Ludwigshafen
3. University of Commerce, Mannheim
4. Engineer, Doctor of Engineering
5. No Party affiliation
6.
7. Technician with I. G. Farben, A. G.

WILHELMI, Gerhard—Assistant
1. 1905, Ludwigshafen
2. Munich, Oberkirdberg nr. Ulm/Wttmbg
3. Commercial High School, Mannbern-Heidelberg
4.
5. No party affiliation
6.
7.

Special Counsel—for All Defendants Case 6

WAHL, Prof. Dr. Eduard—Special Counsel
1. 1901, Frankfurt
2. Heidelberg

3. Universities of Berlin, Heidelberg, and Paris
4. Referendar, Assessor, Doctor of Jurisprudence
5.
6.
7. Professor for International Law at Heidelberg University

FEHSENBECKER, Dr. Julius—Assistant Special Counsel
1. 1921, Mannheim
2. Heidelberg
3. Universities of Freiburg and Heidelberg
4. Referendar, Assessor, Doctor of Jurisprudence and Economy
5. No Party affiliation
6.
7. Scientific Assistant, Heidelberg University

MUELLER, Dr. Rolf W.—Administrative Assistant
1. 1910, Freiburg
2. Zeltern
3. Universities of Heidelberg and Freiburg
4. Doctor of Jurisprudence
5. NSDAP 1933–1945; Corporal in General SS 1933–1936
6. Category IV
7. Official of Legal Division of I. G. Farben

AMBROS, OTTO

HOFFMANN, Dr. Karl—Main Counsel
(See defendant Adolf Pokorny, *supra*, for biographical data)

ALT, Dr. Wolfgang—Assistant
1. 1910, Munich
2. Ludwigshafen
3. Technical University, Dresden
4. Engineer Diploma, Doctor of Engineering
5. No Party affiliation
6.
7. Chemist with I. G. Farben, Ludwigshafen/Rhine

BRUEGGEMANN, MAX
(Severed from the case, 9 September 1947)

KLEFISCH, Dr. Theodore—Main Counsel
1. 1877, Cologne
2. Cologne
3. Universities of Munich, and Bonn
4. Referendar, Assessor, Doctor of Jurisprudence
5. NSDAP 1938–1945
6. Category V
7. Legal practice, Cologne

BUERGIN, ERNST

SCHUBERT, Dr. Werner—Main Counsel
(See defendant Rudolf Deschey, *supra*, for biographical data)

THEOBALD, Wolfgang—Assistant
1. 1904, Berlin
2. Wuppertal
3. Universities of Berlin, Marburg, and Munich
4. Referendar, Assessor
5. NSDAP 1941–1945
6. Category IV
7. Legal Assistant to German Reichsbahn

BUETEFISCH, HEINRICH

FLAECHSNER, Dr. Hans—Main Counsel
(See defendant Otto Steinbrinck, *supra*, for biographical data)

BROSS, Werner—Assistant
1. 1914, Kiel
2. Aensbury
3. Universities of Heidelberg and Berlin
4. Referendar, Assessor.
5. NSDAP 1939–1945
6. Category V
7. No prior practice

HARTMANN, Dr. Kurt—Assistant
1. 1902, Breslau
2. Ilvesheim nr. Mannheim
3. Technical High School, Karlsruhe
4. Department Engineer Dr. Rer. Dec.
5. NSDAP 1933–1945
6. Category IV
7. I. G. Farben

DUERRFELD, WALTER

SEIDL, Dr. Alfred—Main Counsel
(See defendant Fritz Fischer, *supra*, for biographical data)

TRABANDT, Heinz—Assistant
1. 1912, Berlin
2. Fuerth
3. University of Berlin
4. Referendar, Assessor
5. NSDAP 1937–1945
6. Christmas Amnesty 1947
7. Official, Ministry of Labor

GATTINEAU, HEINRICH

ASCHENAUER, Dr. Rudolf—Main Counsel
(See defendant Hans Petersen, *supra*, for biographical data)

DUERR, Dr. Helmut—Assistant
(See defendant Helmut Poppendick, *supra*, for biographical data)

GAJEWSKI, FRITZ

ACHENBACH, Dr. Ernst—Main Counsel (to 1 Feb 1948)
1. 1907, Siegen
2. Essen-Bredeney, Narzissenweg
3.
4. Referendar, Assessor, Doctor of Jurisprudence
5. NSDAP 1937
6. Category IV
7. Law practice, Nuernberg, Paris

METZLER, Dr. Wolfram von—Main Counsel
1. 1906, Munich
2. Hamburg
3. University of Berlin
4. Referendar, Assessor, Doctor of Jurisprudence
5. No Party affiliation
6.
7. Law practice, Hamburg, Opperheim

WEYER, Dr. Carl—Assistant
1. 1909, Vienna
2. Leverkusen
3. University of Paris and Bonn
4. Referendar, Assessor
5. No Party affiliation
6. Category V
7. Legal Adviser, Agfa

HAEFLIGER, PAUL

METZLER, Dr. Wolfram von—Main Counsel
(See defendant Fritz Gajewski, *supra*, for biographical data)

VINASSA, Dr. Walter (Swiss Citizen)—Assistant
1.
2. Geneva, Switzerland
3.
4. Doctor of Jurisprudence
5.
6.
7.

HEYDE, ERICH von der

HOFFMANN, Dr. Karl—Main Counsel
(See defendant Adolf Pokorny, *supra*, for biographical data)

BACHEM, Dr. Walter—Assistant
1. 1908, Frankfurt
2. Frankfurt
3. Universities of Freiburg, Berlin, and Heidelberg
4. Referendar, Assessor, Doctor of Jurisprudence
5. No Party affiliation
6.
7. Employee, I. G. Farben, Berlin

HOERLEIN, HEINRICH

NELTE, Dr. Otto—Main Counsel
(See defendant Siegried Handloser, *supra*, for biographical data)

ILGNER, MAX

NATH, Dr. Herbert—Main Counsel
(See defendant Kalitsche Konrad, *supra*, for biographical data)

LINGENBERG, Dr. Joachim—Assistant
1. 1910, Berlin
2. Alfeld
3. University of Berlin
4. Referendar, Assessor, Doctor of Jurisprudence
5. No Party affiliation

6.
7. Legal practice, Berlin

JAEHNE, FRIEDRICH

PRIBILLA, Dr. Hans—Main Counsel
(See defendant Paul Rostock, *supra*, for biographical data)

EISEMANN, Dr. Adolf—Assistant
1. 1905, Bildstock/Saar
2. Friedrichsthal/Saar
3. Universities of Marburg, Kiel, and Berlin
4. Referendar, Assessor, Doctor of Jurisprudence
5. NSDAP 1933–1945
6. Category IV
7. Scientific assistant in the Reich Ministry of Economics, Berlin

KNIERIEM, AUGUST von

PELCKMANN, Horst—Main Counsel
(See defendant Conrad Schaefer, *supra*, for biographical data)

SILCHER, Dr. Friedrich—Assistant
1. 1906, Reutlingen
2. Leverkusen
3. Berlin
4. Referendar, Assessor
5. No Party affiliation
6.
7. Legal Adviser to I. G. Farben

KRAUCH, CARL

BOETTCHER, Dr. Conrad—Main Counsel
1. 1890, Weissenfela/Saale
2. Stuttgart
3. Universities of Berlin, Halle, Leipzig, and Paris
4. Referendar, Assessor, Doctor of Jurisprudence
5. NSDAP 1937–1945
6. Category V
7. Law practice in Steittin and Berlin; and Notary

ROSPATT, Dr. Henrich von—Assistant
1. 1903, Prittesch
2. Frankfurt
3. Universities of Bonn and Grenoble
4. Referendar, Assessor, Doctor of Jurisprudence
5. NSDAP 1937–1945
6. Christmas Amnesty
7. Legal Adviser to I. G. Ludwigshafen

KUEHNE, HANS

NATH, Dr. Herbert—Main Counsel
(See defendant, Konrad Kaletsch, *supra*, for biographical data)

KROEN, Dr. Erna—Assistant
1. 1906, Lorzendorf/Silesia
2. Leverkusen
3. Universities of Breslau, and Wurzburg
4. Doctor of Economy

5. No Party affiliation
6.
7. Employee, I. G. Farben, Leverkusen

KUGLER, HANS

HENZE, Dr. Helmut—Main Counsel
1. 1906, Berlin
2. Frankfurt
3. University of Berlin
4. Referendar, Assessor
5. No Party affiliation
6.
7. Legal Adviser, I. G. Farben

DELLMENSINGEN, Dr. L. Kraft von—Assistant
1. 1908, Wurzburg
2. Seeshaupt
3. University of Munich
4. Referendar, Doctor of Jurisprudence
5. NSDAP 1942–1945; SA 1937–1943
6. Category IV
7. Legation Secretary to German Embassy in Brussels.

LAUTENSCHLAEGER, CARL

PRIBILLA, Dr. Hans—Main Counsel
(See defendant Paul Rostock, *supra*, for biographical data)

EISENBLAETTER, Helmut—Assistant Counsel
1. 1905, Koenigsberg
2. Nuernberg
3. University, Koenigsberg
4. Referendar, Assessor
5, NSDAP 1937–1945
6. Category IV
7. Judge, German military court

MANN, WILHELM

BERNDT, Dr. Erich—Main Counsel
1. 1886, Halberstadt
2. Frankfurt
3. Universities of Marburg, Heidelberg, and Berlin
4. Referendar, Assessor, Doctor of Jurisprudence
5. No Party affiliation
6.
7. Senior Public Prosecutor, Frankfurt

HENDUS, Heinrich—Assistant
1. 1911, Fulda
2. Fulda
3. Universities of Innsbruck, Munich, and Frankfurt
4. Referendar, Assessor,
5. NSDAP 1933–1945
6. Category V
7. Judge of District Court

MEER, FRITZ ter

BORNEMANN, Karl—Main Counsel
1. 1906, Frankfurt/Main
2. Frankfurt

3. Universities of Heidelberg, Berlin, and Frankfurt
4. Referendar, Assessor
5. NSDAP 1933–1945; SA Corporal 1933–1937
6. Category V
7. District Court Judge in Darmstadt

TUERCK, Dr. Christian—Assistant

1. 1907, Erlangen
2. Munich
3. Universities of Erlangen and Berlin
4. Referendar, Assessor, Doctor of Jurisprudence
5. NSDAP 1933–1941 (Annulled)
6. Category IV
7. Legal Adviser, Continental Oil Co.

OSTER, HEINRICH

HENZE, Helmut—Main Counsel

(See defendant Hans Kugler, *supra*, for biographical data)

GATHER, Dr. Gornot—Assistant

1. 1915, Wuppertal-Elberfeld
2. Frankfurt
3. University of Freiburg
4. Referendar, Assessor, Doctor of Jurisprudence, Doctor rerumnat.
5. NSDAP 1940–1945; SS 1935–1945
6. Category IV
7. Lecturer, University of Freiburg

SCHMITZ, HERMANN

DIX, Dr. Rudolf—Main Counsel

(See defendant Freidrich Flick, *supra*, for biographical data)

GIERLICHS, Hanns—Assistant

1. 1907, Arnsberg
2. Leverkusen
3. Berlin
4. Referendar, Assessor
5. NSDAP 1941–1945
6. Category IV
7. Legal Adviser to I. G. Farben

SCHNEIDER, CHRISTIAN

DIX, Dr. Hellmuth—Main Counsel

1. 1897, Leipzig
2. Fischen/Allgeau
3. University of Berlin
4. Referendar, Assessor, Doctor of Jurisprudence
5. NSDAP 1933–1945
6. Category IV
7. Legal practice, Berlin

STORKEBAUM, Dr. Rupprecht—Assistant

1. 1915, Wolf/Mosel
2. Schoenstadt/Marburg
3. University of Berlin
4. Referendar, Assessor, Doctor of Jurisprudence
5. No Party affiliation

	6. 7. No former practice
SCHNITZLER, GEORG VON	SIMERS, Dr. Walter—Main Counsel (See defendant Bernhard Weiss, *supra*, for biographical data) KELLER, Dr. Rupprecht von—Assistant 1. 1910, Berlin 2. Frankfurt 3. Universities of Lausanne, Buenos Aires, and Munich 4. Referendar, Assessor, Doctor of Jurisprudence 5. NSDAP 1940–1945 6. Category V 7. Official, German Foreign Office
WURSTER, CARL	WAGNER, Dr. Friedrich Wilhelm—Main Counsel 1. 1894, Ludwigshafen 2. Ludwigshafen 3. Universities of Freiburg and Tuebingen 4. Referendar, Assessor, Doctor of Jurisprudence 5. No Party affiliation 6. 7. Law practice, Freiburg, and Legal Adviser to American Federation of Labor HEINTZELER, Dr. Wolfgang—Assistant 1. 1908, Berlin 2. Mannheim 3. Universities of Tuebingen, Berlin, and Munich 4. Referendar, Assessor, Doctor of Jurisprudence 5. NSDAP 1937–1945; SA 1931 6. Category IV 7. Legal Adviser to I. G. Farben

CASE 7–TRIBUNAL V—SOUTHEAST CASE

DEHNER, ERNST	GAWLIK, Dr. Hans—Main Counsel (See defendant Waldemar Hoven, *supra*, for biographical data) KLUG, Heinrich—Assistant 1. 1906, Cologne 2. Waldmunich, Bavaria 3. Universities Breslau, Leipzig, and Heidelberg 4. Referendar 5. NSDAP 1937–1945 6. Category III 7. Public Prosecutor, Reich Ministry of Justice, Berlin

FELMY, HELIMUTH	MUELLER-TORGOW, Dr. Heinz—Main Counsel 1. 1908, Stettin 2. Nuernberg 3. Universities of Jena and Berlin 4. Assessor, Doctor of Jurisprudence 5. SA Member 1933–1945 6. Category IV 7. Administrative Official German Army DOHME, Johannes—Assistant 1. 1911, Theringen 2. Nuernberg 2. Universities of Freiburg, Jena, and Erlangen 4. Referendar, Assessor 5. NSDAP 1933–1943; General SS 1933–1934 6. Category IV 7. Assessor
FOERTSCH, HERMANN	RAUSCHENBACH, Gerhard—Main Counsel (See defendant August Frank, *supra*, for biographical data) HINDEMITH, Dr. Guenther—Assistant 1. 1900, Peterwitz, Lower Silesia 2. Klardorf/Oberpfalz 3. University of Breslau 4. Referendar, Assessor, Doctor of Jurisprudence 5. NSDAP 1933–1945 6. Category IV 7. Judge, Auschwitz
GEITNER, KURT von	SAUTER, Dr. Fritz—Main Counsel (See defendant Kurt Blome, *supra*, for biographical data) SCHMITT, Dr. Walter—Assistant 1. 1905, Edesheim 2. Nuernberg 3. Gymnasium Landau and Neustadt 4. Referendar, Assessor, Doctor of Jurisprudence 5. NSDAP 1937–1942; SA 1933–1939 6. 7. Judge, Amtsgericht
KUNTZE, WALTER	MENZEL, Dr. Georg—Main Counsel 1. 1907, Hochkirch/Glogau 2. Augsburg 3. Universities of Munich, Berlin, and Breslau 4. Referendar, Assessor 5. No Party affiliation 6. 7. Law practice, Breslau

BEIER, Dr. Walter—Assistant

1. 1905, Neustadt/Upper Silesia
2. Furth am Wald, Bavaria
3. Universities of Munich and Breslau
4. Referendar, Assessor, Doctor of Jurisprudence
5. NSDAP 1933–1945
6. Category IV
7. Law practice, Neustadt

LANZ, HUBERT

SAUTER, Dr. Fritz—Main Counsel

(See defendant Kurt Blome, *supra*, for biographical data)

GEITNER, Herbert—Assistant

1. 1911, Aschaffenburg
2. Ambach/Starnbergerstee
3. Military Academy
4.
5. No Party affiliation
6. Category V
7. Professional soldier (Lt. Col., General Staff, German Army)

LEYSER, ERNST von

TIPP, Dr. Edmund—Main Counsel

(See defendant Paul Barnickel, *supra*, for biographical data)

GROSS, Walter—Assistant

1. 1912, Nuernberg
2. Nuernberg
3. Universities Munich, Erlangen, and Rostock
4. Referendar, Assessor
5. Applicant SS 1933–1934; Applicant SA 1933–1934, Member SA 1937–1942
6. Category IV
7. Military judge with the Luftwaffe

LIST, WILHELM

LATERNSER, Dr. Hans—Main Counsel

1. 1908, Diedenhofen
2. Wiesbaden
3. Universities of Frankfurt, Marburg, and Berlin
4. Referendar, Assessor, Doctor of Jurisprudence
5. NSDAP 1933–1945
6. Category V
7. Legal practice in Wiesbaden

LIER, Hans Wilhelm—Assistant

1. 1902, Quedlinberg
2. Wetzlar
3. Universities of Giessen, Goettingen, Marburg
4. Referendar, Assessor
5. SA Reitersturm, 1933 (5 months only)
6. Category IV
7. Official with Legal Division, German Navy

RENDULIC, LOTHAR	FRITSCH, Stefan—Main Counsel (See defendant Hans Baier, *supra*, for biographical data) JAGWITZ, Dr. Oskar von—Assistant (See defendant Hans Baier, *supra*, for biographical data)
SPEIDEL, WILHELM	WEISGERBER, Dr. Joseph—Main Counsel (See defendant Wolfram Sievers, *supra*, for biographical data) BERGLER, Dr. Erich—Assistant (See defendant Wolfram Sievers, *supra*, for biographical data)
WEICHS, MAXIMILIAN von	LATERNSER, Dr. Hans—Main Counsel (See defendant Wilhelm List, *supra*, for biographical data) LUCHT, Dr. Harold—Assistant 1. 1904, Greifswald 2. Reit im Winkel, Upper Bavaria 3. Universities of Heidelberg and Greifswald 4. Referendar, Assessor, Doctor of Jurisprudence 5. NSDAP 1940–1945 6. Category IV 7. Manager of association of wholesalers

CASE 8—TRIBUNAL I—RuSHA

BRUECKNER, HEINZ	DOETZER, Dr. Karl—Main Counsel (See defendant Guenther Nebelung, *supra*, for biographical data) DOETZER, Gerda—Assistant (See defendant, Guenther Nebelung, *supra*, for biographical data)
CREUTZ, RUDOLF	MERKEL, Rudolf—Main Counsel (See defendant Karl Genzken, *supra*, for biographical data) BRENNER, Alfred—Assistant (See defendant Karl Genzken, *supra*, for biographical data)
EBNER, GREGOR	THIELE-FREDERSDORF, Hebert—Main Counsel (See defendant Guenther Joel, *supra*, for biographical data)
GREIFELT, ULRICH	HAENSEL, Dr. Carl—Main Counsel (See defendant Guenther Joel, *supra*, for biographical data) TRENCK, Gisela von der—Assistant 1. 1920, Berlin 2. Tuebingen 3. Universities Berlin, Tuebingen, and Munich 4. Legal assistant 5. No Party affiliation 6.

	7. Assistant to judicial faculty of University of Tuebingen
HILDEBRANDT, RICHARD	FROESCHMANN, Dr. Georg—Main Counsel (See defendant Vicktor Brack, *supra*, for biographical data)
	PRACHT, Dr. Karl—Assistant (See defendant Karl Mummenthey, *supra*, for biographical data)
HOFMANN, OTTO	SCHWARZ, Dr. Otfried—Main Counsel (See defendant Hans Petersen, *supra*, for biographical data)
	ZAPF, Dr. Ewald—Assistant 1. 1913, Gelbsreuth, Upper Frankonia 2. Fuerth 3. Universities Erlangen and Berlin 4. Referendar, Assessor, Doctor of Jurisprudence 5. NSDAP 1933–1945; SA 1933–1939 6. Category IV 7. Judge, Oberlandesgericht, Nuernberg
HUEBNER, HERBERT	DURCHHOLZ, Dr. Ernst—Main Counsel 1. 1908, Aschaffenburg 2. Nuernberg 3. University of Munich 4. Referendar, Assessor 5. NSDAP 1933–1945 6. Category V 7. Public prosecutor, Nuernberg
	MUELLER, Dr. Hermann—Assistant 1. 1910, Kirchheim 2. Nuernberg 3. Universities of Wurzburg and Munich 4. Referendar, Assessor, Doctor of Jurisprudence 5. NSDAP 1937–1945; SA Rottenfuehrer 1939–1945 6. Category IV 7. Public prosecutor, Nuernberg
LORENZ, WERNER	HESSE, Ernst—Main Counsel 1. 1910, Witten/Ruhr 2. Witten/Ruhr 3. Universities of Cologne, Munich, and Goettingen 4. Referendar, Assessor 5. NSDAP 1933–1945; SA 1933–1936 6. Category IV 7. Legal practice, Berlin
	SCHUBERT, Dr. Werner—Assistant (See defendant Rudolf Oeschey, *supra*, for biographical data)
MEYER-HETLING, KONRAD	BEHLING, Dr. Kurt—Main Counsel 1. 1906, Torun 2. Berlin 3. Universities of Wurzburg, Berlin, and Koenigsberg

4. Referendar, Assessor, Doctor of Jurisprudence
5. NSDAP 1935–1945
6. Category V
7. Legal practice, Berlin

MUELLER, Karl—Assistant
1. 1917, Wurzburg
2. Hamburg
3. Universities of Munich and Hamburg
4. Referendar
5. No Party affiliation
6.
7. No prior practice

SCHWALM, FRITZ

HEIM, Dr. Willi—Main Counsel
1. 1914, Roding
2. Nuernberg
3. Universities of Erlangen and Dresden
4. Referendar, Assessor, Doctor of Jurisprudence
5. NSDAP 1937–1945
6. Category IV
7. Law practice, Nuernberg

MAAS, Dr. Wilhelm—Assistant
(See defendant Hans Hohberg, *supra*, for biographical data)

SCHWARZENBERGER, OTTO

GAWLIK, Dr. Hans—Main Counsel
(See defendant Waldermar Hoven, *supra*, for biographical data)

KLINNERT, Dr. Gerhard—Assistant
(See defendant Waldermar Hoven, *supra*, for biographical data)

SOLLMANN, MAX

RATZ, Dr. Paul—Main Counsel
(See defendant Hermann Pook, *supra*, for biographical data)

RENTSCH, Heinrich—Assistant
1. 1897, Bayreuth
2. Lauf/Pegnitz
3. University of Erlangen
4. Referendar, Assessor
5. NSDAP 1937–1945; SA Sergeant 1937–1945
6. Category IV
7. Chief magistrate of Leuf

TESCH, GUENTHER

SCHMIDT, Dr. Wilhelm—Main Counsel
(See defendant Josef Vogt, *supra*, for biographical data)

BRAUNE, Dr. Ernst—Assistant
1. 1911, Rothenburg
2. Fuerth
3. Universities of Munich and Erlangen
4. Referendar, Doctor of Jurisprudence
5. NSDAP 1933–1945; SA Sergeant 1933–1938
6. Category IV
7. Legal Division of the Reichsbahn

VIERMETZ, INGE	ORTH, Hermann—Main Counsel (See defendant Josef Altstoetter, *supra*, for biographical data) ALTSTOETTER, Dr. Ludwig—Assistant (See defendant Josef Altstoetter, *supra*, for biographical data)

CASE 9—TRIBUNAL II—EINSTATZGRUPPEN

BIEBERSTEIN, ERNST	BERGOLD, Dr. Friedrich—Main Counsel (See defendant Erhard Milch, *supra*, for biographical data) FICHT, Dr. Oskar—Assistant (See defendant Horst Klein, *supra*, for biographical data)
BLOBEL, PAUL	HEIM, Dr. Willi—Main Counsel (See defendant Fritz Schwalm, *supra*, for biographical data) KOHR, Ludwig—Assistant 1. 1909, Ansbach 2. Nuernberg 3. Universities of Munich and Wurzburg 4. Referendar, Assessor 5. NSDAP 1937–1945 6. Category IV 7. Judge, Nuernberg
BLUME, WALTER	LUMMERT, Dr. Guenther—Main Counsel 1. 1903, Waldenburg/Silesia 2. Fuerth 3. Universities of Breslau and Berlin 4. Referendar, Assessor, Doctor of Jurisprudence 5. NSDAP 1933–1945; Member SA 6. Category V 7. Attorney at Oberlandesgericht, Breslau BLUME, Dr. Rudolf—Assistant 1. 1902, Dortmund 2. Bielefeld 3. Universities of Bonn and Muenster 4. Referendar, Assessor 5. NSDAP 1933–1945; SA 1933–1945 6. 7. Judge of the Landericht Paderborn
BRAUNE, WERNER	MAYER, Dr. Erich—Main Counsel (See defendant Max Kiefer, *supra*, for biographical data) STUEBINGER, Dr. Oskar—Assistant 1. 1908, Nuernberg 2. Vorra/Pegnitz 3. Universities of Wurzburg, Erlangen, and Leipzig 4. Referendar, Assessor 5. NSDAP 1933–1945 6. Category IV 7. Prosecuting Attorney, Hersbruck

FENDLER, LOTHER	FRITZ, Dr. Hans—Main Counsel (See defendant Gerhard Rose, *supra*, for biographical data) LEHMANN, Dr. Gabriele—Assistant 1. 1918, Nuernberg 2. Nuernberg 3. University of Munich 4. Referendar, Assessor, Doctor of Jurisprudence 5. No Party affiliation 6. 7. Attorney of District Court, Nuernberg
GRAF, MATTHIAS	BELZER, Dr. Eduard—Main Counsel (See defendant Karl Sommer, *supra*, for biographical data) MAYER, Joseph—Assistant (See defendant Karl Sommer, *supra*, for biographical data)
HAENSCH, WALTER	RIEDIGER, Dr. Fritz—Main Counsel 1. 1897, Freyhan 2. Marktredwitz/Bavaria 3. University of Breslau 4. Referendar, Assessor, Doctor of Jurisprudence 5. NSDAP 1933–1945 6. Christmas Amnesty 1947 7. Legal practice in Breslau KRAUSE, Max—Assistant 1. 1900, Priebus 2. Nuernberg 3. University of Breslau 4. Referendar, Assessor 5. NSDAP 1940–1945 6. Category IV 7. Court Assessor, Breslau
JOST, HEINZ	SCHWARZ, Dr. Alfred—Main Counsel 1. 1900, Nuernberg 2. Nuernberg 3. University of Erlangen 4. Referendar, Assessor 5. NSDAP 1932–1945 6. Category IV 7. Legal practice, Nuernberg WIESSMATH, Paul—Assistant 1. 1911, Nuernberg 2. Nuernberg 3. University of Erlangen and Munich 4. Referendar, Assessor 5. NSDAP 1937–1945 6. Category IV 7. Legal Advisor to Postmaster, Nuernberg
KLINGELHOEFER, WALDEMAR	MAYER, Dr. Erich—Main Counsel (See defendant Max Kiefer, *supra*, for biographical data)

	LEIS, Dr. Ferdinand—Assistant (See defendant Max Keifer, *supra*, for biographical data)
NAUMANN, ERICH	GAWLIK, Dr. Hans—Main Counsel (See defendant Waldemar Hoven, *supra*, for biographical data) KLINNERT, Dr. Gerhard—Assistant (See defendant Waldemar Hoven, *supra*, for biographical data)
NOSSKE, GUSTAV	HOFFMANN, Dr. Karl—Main Counsel (See defendant Adolf Pokorny, *supra*, for biographical data)
OHLENDORF, OTTO	ASCHENAUER, Rudolf—Main Counsel (See defendant Hans Petersen, *supra*, for biographical data) OEHLRICH, Dr. Conrad—Assistant 1. 1901, Hamburg 2. Verden/Aller 3. University of Hamburg 4. Doctor of Jurisprudence 5. NSDAP 1933–1945 6. 7. Referent at German Institute for Foreign Affairs
OTT, ADOLF	KOESSE, Dr. Josef—Main Counsel (See defendant Oswald Rothaug, *supra*, for biographical data) MEYER, Dr. Rudolf—Assistant 1. 1908, Ansbach 2. Pollenfeld 3. Universities of Wurzburg, Paris, and Geneva 4. Referendar, Doctor of Jurisprudence 5. NSDAP 1932–1945; SA 1933–1945 6. 7. Regierungsrat, Finance Administration
RADETZKY, WALDEMAR VON	RATZ, Dr. Paul—Main Counsel (See defendant Hermann Pook, *supra*, for biographical data) RENTSCH, Heinrich—Assistant (See defendant Max Sollmann, *supra*, for biographical data)
RASCH, OTTO (Severed from Case 5 Feb 48)	SURHOIT, Dr. Hans—Main Counsel 1. 1900, Minden 2. Berlin 3. University of Muenster 4. Referendar, Assessor, Doctor of Jurisprudence 5. NSDAP 1933–1945 6. Category IV 7. Legal practice, Berlin
REUHL, FELIX	LINK, Heinrich—Main Counsel 1. 1912, Gunzenhausen 2. Nuernberg 3. University of Munich

	4. Referendar, Assessor 5. NSDAP 1937–1945 6. Category IV 7. Law practice, Nuernberg
	HELM, Dr. Kurt—Assistant 1. 1898, Traunstein 2. Hersbruck/Mfr. 3. University of Erlangen 4. Referendar, Assessor, Doctor of Jurisprudence 5. NSDAP 1933–1945 6. Category IV 7. Judicial referent at the Chamber of Handicraft, Nuernberg
SANDBERGER, MARTIN	STEIN, Dr. Bolko von—Main Counsel (See defendant Franz Eirenschmalz, *supra*, for biographical data)
	MANDRY, Dr. Kurt—Assistant 1. 1895, Heilbronn/Neckar 2. Stuttgart 3. Universities of Tuebingen and Munich 4. Referendar, Assessor, Doctor of Jurisprudence 5. No Party affiliation 6. 7. Law practice, Stuttgart
SCHUBERT, HEINZ	KOESSL, Dr. Josef—Main Counsel (See defendant Oswald Rothaug, *supra*, for biographical data)
	MEYER, Dr. Rudolf—Assistant (See defendant Adolf Ott, *supra*, for biographical data)
SCHULZ, ERWIN	DURCHHOLZ, Dr. Ernst—Main Counsel (See defendant Herbert Huebner, *supra*, for biographical data)
	MUELLER, Dr. Hermann—Assistant (See defendant Herbert Huebner, *supra*, for biographical data)
SEIBERT, WILLY	KLINNERT, Dr. Gerhard—Main Counsel (See defendant Waldemar, Hoven, *supra*, for biographical data)
	KLUG, Dr. Heinrich—Assistant (See defendant Ernst Dehner, *supra*, for biographical data)
SIX, FRANZ	ULMER, Hermann—Main Counsel 1. 1909, Ansbach 2. Nuernberg 3. Universities of Erlangen and Munich 4. Referendar, Assessor 5. NSDAP 1933–1945 6. Category IV 7. Judge, German Air Forces; Law practice, Nuernberg

VOELKL, Dr. Konrad—Assistant
1. 1910, Nuernberg
2. Nuernberg
3. Universities of Berlin and Erlangen
4. Referendar, Assessor, Doctor of Jurisprudence
5. NSDAP 1937–1944
6. Category IV
7. Referent in Nuernberg

STEIMLE, EUGENE

MAYER, Dr. Erich—Main Counsel
(See defendant Max Kiefer, *supra*, for biographical data)

LEIS, Dr. Ferdinand—Assistant
(See defendant Max Kiefer, *supra*, for biographical data)

STRAUCH, EDUARD

GICK, Dr. Karl—Main Counsel
1. 1903, Nuernberg
2. Nuernberg
3. University of Erlangen
4. Referendar, Assessor, Doctor of Jurisprudence
5. NSDAP 1933–1945
6. Christmas Amnesty 1947
7. Law practice, Nuernberg

JAEGER, Dr. Karl—Assistant
1. 1893, Waldenburg/Silesia
2. Bamberg
3. Universities of Breslau, Freiburg, and Halle
4. Referendar, Assessor, Doctor of Jurisprudence
5. No Party affiliation
6.
7. Law practice, Waldenburg/Silesia

CASE 10—TRIBUNAL III—KRUPP

BALLAS, Dr. Walter—Special Counsel for all Defendants in case 10
1. 1887, Duisburg
2. Essen
3. University of Muenster
4. Referendar, Assessor, Doctor of Jurisprudence
5. No Party affiliation
6.
7. Chief, Legal Division, Friedrich Krupp A. G.

BUELOW, FRIEDRICH VON

POHLE, Dr. Wolfgang—Counsel
1. 1903, Erfurt
2. Duesseldorf
3. University of Goettingen
4. Referendar, Assessor, Doctor of Jurisprudence
5. NSDAP 1933–1945

6. Category IV
7. Legal practice, Duesseldorf

ROBINSON, Joseph S. (American)—Co-counsel
Lt. Col., JAG, U. S. Army, Retired
Prosecutor in Kronberg jewel case
Washington, D. C.

MASCHKE, Dr. Hermann M.—Assistant
1. 1909, Allenstein, East Prussia
2. Goettingen
3. Universities of Berlin and Goettingen
4. Referendar, Assessor, Doctor of Jurisprudence
5. NSDAP 1940–1945
6. Category IV
7. Legal Adviser, Reichsgruppe Industrie

EBERHARDT, KARL

SIEMERS, Dr. Walter—Main Counsel
(See defendant Bernhard Weiss, *supra*, for biographical data)

WEIZ, Dr. Gerhart—Assistant
1. 1906, Rastatt
2. Bonn
3. Universities of Berlin, Frankfurt, Cologne, and Bonn
4. Referendar, Assessor, Doctor of Jurisprudence
5. NSDAP 1937–1945
6. Category V
7. First Secretary, German Embassy, Buenos Aires, 1937–1944

HOUDREMONT, EDUARD

PESCHKE, Dr. Kurt—Main Counsel
1. 1886, Frankfurt/O.
2. Berlin
3. Gymnasium, Steglitz
4. Referendar, Assessor, Doctor Jurisprudence
5. NSDAP 1940–1945
6.
7. Law practice and Notary Public, Berlin

KUROWSKI-SCHMITZ, Dr. Aenne—Assistant
1. 1894, Krefeld
2. Krefeld
3. Universities of Munich, Freiburg, Berlin, and Bonn
4. Referendar, Assessor, Doctor of Jurisprudence
5. No Party affiliation
6.
7. Practice of law, Danzig

IHN, MAX

KRANZBUEHLER, Otto—Main Counsel
(See defendant Odilo Burkart, *supra*, for biographical data)

	ARNDT, Dr. Karl—Assistant 1. 1904, Berlin 2. Rinteln 3. Universities of Berlin and Harvard 4. Referendar, Assessor, Doctor of Jurisprudence 5. NSDAP 1938–1945; Lt. in Waffen SS 1944–1945 6. Category V 7. Judge, Oberlandesgericht, Berlin
JANSSEN, FRIEDRICH	SCHILF, Dr. Alfred—Main Counsel (See defendant Herbert Klemm, *supra*, for biographical data) LIPPE, Dr. Viktor von der—Assistant 1. 1912, Vienna 2. Hamburg 3. Universities of Vienna and Consular Academy Vienna 4. Referendar, Assessor, Doctor of Jurisprudence, and Consular Diplomat 5. NSDAP 1933–1945 6. Category IV 7. Vice-Consul at the German Consulate, Geneva
KORSCHAN, HEINRICH	WANDSCHNEIDER, Dr. Erich—Main Counsel (See defendant Curt Rothenberger, *supra*, for biographical data) KUEHN, Dr. Rudolf—Assistant 1. 1904, Rostock 2. Prien/Chiemsee 3. Universities of Rostock and Munich 4. Referendar, Assessor, Doctor of Jurisprudence 5. NSDAP 1933–1945; Blockleiter 1933–1945 6. Category IV 7. Judge and Public prosecutor, Rostock
KRUPP von BOHLEN und HALBACH, ALFRIED	KRANZBUEHLER, Otto—Main Counsel (See defendant Odilo Buckart, *supra*, for biographical data) WECKER, Dr. Fritz—Assistant (See defendant Bernhard Weiss, *supra*, for biographical data)
KUPKE, HANS	BEHRINGER, Dr. Alfred—Main Counsel 1. 1904, Streitau, Upper Frankonia 2. Nuernberg 3. Universities of Kiel, Erlangen, and Munich 4. Referendar 5. No Party affiliation 6. 7. Law practice, Nuernberg

	STUEBINGER, Dr. Oskar—Assistant (See defendant, Werner Braune, *supra*, for biographical data)
LEHMANN, HEINRICH	WOLF, Heinz—Main Counsel 1. 1908, Limburg 2. Nuernberg 3. University of Frankfurt 4. Referendar, Assessor 5. NSDAP 1933–1945 6. Category V 7. Chief Prosecuting Attorney, Traunstein
	HAACK, ERWIN—Assistant 1. 1904, Koenigsberg/East Prussia 2. Bad Reichenhall 3. Gymnasium Koenigsberg 4. Referendar, Assessor 5. NSDAP 1933–1945; Blockleiter 1933–1939 6. Christmas Amnesty 1947 7. Associate Judge, Oberlandesgericht, Koenigsberg
LOESER, EWALD	BEHLING, Dr. Kurt—Main Counsel (See defendant Konrad Meyer-Hetling, *supra*, for biographical data)
	WENDLAND, Guenther—Assistant 1. 1911, Kolberg 2. Bad Wiessee 3. Gymnasium Kolberg 4. Referendar, Assessor 5. NSDAP 1937–1945; SA Corporal 1933–1935 6. 7. No prior practice
MUELLER, ERICH	LINK, Heinrich—Main Counsel (See defendant Felix Ruehl, *supra*, for biographical data)
	REITZENSTEIN, Otto—Assistant 1. 1911, Burgkunstadt 2. Fuerth 3. Universities of Erlangen and Munich 4. Referendar, Assessor 5. NSDAP 1937–1945; Blockhelfer 1937–1945 6. 7. No prior practice
PFIRSCH, KARL	VORWERK, Dr. Bernhard—Main Counsel (See defendant Hans Wolfgang Romberg, *supra*, for biographical data)
	SCHMIDT, Dr. Johannes—Assistant 1. 1897, Zwickau 2. Erlangen 3. University of Leipzig 4. Referendar, Assessor, Doctor of Jurisprudence 5. No Party affiliation

6.
7. Landgerichtsrat, Dresden

CASE 11—TRIBUNAL IV—MINISTRIES

SCHMIEDEN, Dr. Werner von—Special Counsel for seven defendants in case 11
1. 1892, Leipzig
2. Jettingen Castle nr. Augsburg
3. Universities of Lausanne, Munich, and Leipzig
4. Referendar, Doctor of Jurisprudence
5. No Party affiliation
6.
7. Senior Counselor, German Foreign Office

MATHY, Klaus—Assistant
1. 1918, Heidelberg
2. Halle
3. Universities of Halle, Lausanne, and Berlin
4. Referendar
5. NSDAP 1937–1945
6. Category IV
7. Scientific Assistant, German Foreign Office.

RICHTHOFEN, Prof. Dr. Bolko von—Historical Assostamt
1. 1899, Mertschutz
2. Hamburg
3. Universities of Munich and Breslau
4. Doctor of Philosophy
5. NSDAP 1933–1945
6. Category IV
7. Lecturer at Budapest University and student of Archaelogical Research

PATZIG, Hans Guenther—Assistant, Interpreter
1. 1917, Dresden
2. Nuernberg
3. Gymnasium Dresden
4.
5. NSDAP 1938–1945
6.
7.

BERGER, GOTTLOB

FROESCHMANN, Dr. Georg—Main Counsel
(See defendant Viktor Brack, *supra*, for biographical data)

PRACHT, Dr. Karl—Assistant
(See defendant Karl Mummenthey, *supra*, for biographical data)

BOHLE, ERNST WILHELM

GOMBEL, Dr. Elisabeth—Main Counsel
1. 1912, Hamburg
2. Hamburg
3. Universities of Kiel, Berlin, and Hamburg

4. Referendar, Doctor of Jurisprudence
5. No Party affiliation
6.
7. Legal Adviser, Junkers Aircraft Factory

ACHENBACH, Dr. Ernst—Main Counsel (to 15 Jan 1948)
1. 1907, Siegen
2. Essen-Bredeney, Narzissenweg
3.
4. Referendar, Assessor, Doctor of Jurisprudence
5. NSDAP–1937
6. Category IV
7. Law practice, Nuernberg

MATHY, Klaus—Assistant
(See defendant Karl Pfirsch, *supra*, for biographical data)

DARRE, RICHARD WALTHER

MERKEL, Dr. Hans—Main Counsel
1. 1902, Fuerth
2. Goslar
3. Universities of Wurzburg and Marburg
4. Referendar, Assessor, Doctor of Jurisprudence
5. Major in the SS
6. Category V
7. Law practice, Augsburg, Official, SS Main

JOPPICH, Dr. Adalbert—Assistant
(See defendant Bernhard Weiss, *supra*, for biographical data)

DIETRICH, OTTO

BERGOLD, Dr. Friedrich—Main Counsel
(See defendant Erhard Milch, *supra*, for biographical data)

VOGEL, Gottfried—Assistant
1. 1906, Uttenhofen
2. Nuernberg
3. Universities of Munich and Erlangen
4. Referendar, Assessor
5. NSDAP 1935–1945
6. Category IV
7. Court Assessor, Amtsgericht, Nuernberg

ERDMANNSDORFF, OTTO von

VORWERK, Dr. Bernhard—Main Counsel
(See defendant Hans Wolfgang Romberg, *supra*, for biographical data)

PAPEN, Franz von—Assistant
(See defendant Otto Steinbrinck, *supra*, for biographical data)

KEHRL, HANS

GRUBE, Dr. Heinrich—Main Counsel
(See defendant Ernst Lautz, *supra*, for biographical data)

MEYER, Dr. Rudolf—Assistant
(See defendant Adolf Ott, *supra*, for biographical data)

KEPPLER, WILHELM	SCHUBERT, Dr. Werner—Main Counsel (See defendant Rudolf Oeschey, *supra*, for biographical data) EISOLD, Dr. Heinrich—Assistant 1. 1897, Zittau 2. Nuernberg 3. Universities of Leipzig and Freiburg 4. Referendar, Assessor, Doctor of Jurisprudence 5. NSDAP 1933–1945 6. Category IV 7. Law practice, Dresden
KOERNER, PAUL	KOCH, Dr. Justus—Main Counsel 1. 1891, Magdeburg 2. Hindelang/Allgaeu 3. Universities of Munich, Halle, and Berlin 4. Referendar, Assessor, Doctor of Jurisprudence 5. NSDAP 1933–1945 6. Category V 7. Law practice, Berlin RAUSCHENBACH, Gerhard—Co-counsel (See defendant August Frank, *supra*, for biographical data) BERGMANN, Dr. Joachin—Assistant 1. 1906, Koblenz 2. Düsseldorf 3. Universities of Tuebingen, Berlin, and Paris 4. Referendar, Assessor, Doctor of Jurisprudence 5. NSDAP 1941–1945; Corporal in General SS 1933–1937 6. Category IV 7. Defense Counsel, Decision Board, Bielefeld
LAMMERS, HANS HEINRICH	SEIDL, Dr. Alfred—Main Counsel (See defendant Fritz Fischer, *supra*, for biographical data) LAUE, Dr. Wolfgang—Assistant 1. 1905, Mainz 2. Rosenheim 3. Universities of Munich and Erlangen 4. Referendar, Assessor, Doctor of Jurisprudence 5. NSDAP 1933–1945 6. Amnesty April 1948 7. Judicial Referent at the Reichs Chancellory, Berlin
MEISSNER, OTTO	SAUTER, Dr. Fritz—Main Counsel (See defendant Kurt Blome, *supra*, for biographical data)

	TEMPLER, Dr. Alfons—Assistant 1. 1905, Augsburg 2. Munich 3. Universities of Rostock and Grenoble 4. Referendar, Assessor, Doctor of Jurisprudence 5. No Party affiliation 6. 7. Law practice, Munich
PLEIGER, PAUL	SERVATIUS, Dr. Robert—Main Counsel (See defendant Karl Brandt, *supra*, for biographical data) WOLFF, Dr. Georg—Assistant 1. 1904, Munich-Gladbach 2. Beddingen, Kreis Selzgitter 3. Universities of Cologne and Pittman College, London 4. Referendar, Assessor, Doctor of Jurisprudence 5. NSDAP 1933–1934 6. Category IV 7. Chief Legal Section, Hermann Goering Works, Berlin
PUHL, EMIL	GAWLIK, Dr. Hans—Main Counsel (See defendant Waldemar Hoven, *supra*, biographical data) KLUG, Dr. Heinrich—Assistant (See defendant Ernst Dehner, *supra*, for biographical data)
RASCHE, KARL	KUBUSCHOK, Dr. Egon—Main Counsel (See defendant Wilhelm Von Ammon, *supra*, for biographical data) SCHAEFFER, Dr. Adolf—Assistant 1. 1904, Hamburg 2. Lueneburg 3. Universities of Jena and Hamburg 4. Referendar, Assessor 5. NSDAP 1933–1945 6. Category IV 7. Legal Advisor to Dresdner Bank
RITTER, KARL	PELCKMANN, Horst—Main Counsel (See defendant Konrad Schaefer, *supra*, for biographical data) SCHMIDT-LEICHNER, Dr. Erich—Co-counsel (See defendant Hermann Teberger, *supra*, for biographical data)
SCHELLENBERG, WALTER	RIEDIGER, Dr. Fritz—Main Counsel (See defendant Walter Haensch, *supra*, for biographical data) MINTZEL, Kurt—Assistant 1. 1906, Nuernberg 2. Nuernberg 3. University of Erlangen 4. Referendar, Assessor

	5. NSDAP 1933–1945 6. Category IV 7. Councilor, City of Nuernberg
KORSIGK, LUTZ SCHWERIN von	FRITSCH, Dr. Stefan—Main Counsel (See defendant Hans Baier, *supra*, for biographical data) MENZEL, Dr. Georg—Assistant (See defendant Walter Kuntze, *supra*, for biographical data)
MOLLAND, GUSTAV ADOLF STEENGRACHT VON	HAENSEL, Dr. Carl—Main Counsel (See defendant Guenther Joel, *supra*, for biographical data) TRENCK, Gisela von der—Assistant (See defendant Ulrich Greifelt, *supra*, for biographical data)
STUCKART, WILHELM	ZWEHL, Dr. Hans von—Main Counsel 1. 1883, Berlin 2. Frankfurt 3. Universities of Goettingen, Oxford, Geneva, and Bonn 4. Referendar, Assessor, Doctor of Jurisprudence 5. NSDAP 1937–1945 6. Category IV 7. Law practice, Berlin STACKELBERG, Dr. Curt von—Co-counsel (See defendant Heinz Karl Fanslau, *supra*, for biographical data) KLAS, Adolf—Assistant 1. 1904, Kroppach 2. Lemmie/Hannover 3. Universities of Giessen and Frankfurt 4. Referendar, Assessor 5. NSDAP 1932–1945 6. 7. Ministerial Councilor in Austria
VEESENMAYER, EDMUND	DOETZER, Dr. Karl—Main Counsel (See defendant Heinz Brueckner, *supra*, for biographical data) DOETZER, Gerda—Assistant (See defendant Heinz Brueckner, *supra*, for biographical data)
WEIZSAECKER, ERNST von	BECKER, Hellmut—Main Counsel 1. 1913, Hamburg 2. Kressbronn/Bodensee 3. Universities of Freiburg, Berlin, and Kiel 4. Referendar, Assessor 5. NSDAP 1937–1945 6. 7. Legal practice, Regensburg MAGEE, Warren E. (American)—Co-counsel Member of the Bar of Supreme Court of the United States; Court of Appeals for District of Columbia and Circuit Court

	Special Attorney in the U. S. Department of Justice Home: Washington, D. C.
	BRAUN, Sigismund von—Assistant 1. 1911, Berlin 2. Nuernberg 3. Universities of Hamburg and Berlin 4. Referendar 5. NSDAP 1939–1945 6. 7. Attaché in German Embassy, Rome
	WEIZSAECKER, Richard von—Assistant 1. 1920, Stuttgart 2. Goettingen 3. Universities of Grenoble, Goettinge, and Oxford 4. Referendar 5. No Party affiliation 6. 7. No practice
WOERMANN, ERNST	SCHILF, Dr. Alfred—Main Counsel (See defendant Herbert Klemm, *supra*, for biographical data)
	LEHMANN, Dr. Gabriele—Assistant (See defendant Lothar Fendler, *supra*, for biographical data)

CASE 12—TRIBUNAL V—HIGH COMMAND

BLASKOWITZ, JOHANNES (Committed suicide 4 Feb 1948)	MUELLER-TORGOW, Heinz—Main Counsel (See defendant Hellmuth Felmy, *supra*, for biographical data)
HOLLIDT, KARL	FRITSCH, Dr. Stefan—Main Counsel (See defendant Hans Baier, *supra*, for biographical data)
	JAGWITZ, Oskar von—Assistant (See defendant Hans Baier, *supra*, for biographical data)
ROTH, HERMANN	MUELLER-TORGOW, Heinz—Main Counsel (See defendant Hellmuth Felmy, *supra*, for biographical data)
	JUNG, Dr. Hans Joachim—Assistant 1. 1904, Danzig 2. Nuernberg 3. Universities of Berlin, Marburg, Innsbruck, and Greifswald 4. Referendar, Assessor, Doctor of Jurisprudence 5. NSDAP 1939–1945 6. Christmas Amnesty 1947 7. Official, Quartermaster Corps, German Army

KUECHLER, GEORG KARL FREIDRICH-WILHELM von	BEHLING, Dr. Kurt—Main Counsel (See defendant Konrad Meyer-Hetling, *supra*, for biographical data) HERRMANN, Paul—Assistant 1. 1898, Munich 2. Munich 3. Junior College, Munich 4. No degree 5. No Party affiliation 6. 7. Professional soldier, Military Advisor
LEEB, WILHELM von	LATERNSER, Dr. Hans—Main Counsel (See defendant Wilhelm List, *supra*, for biographical data) LIER, Hans Wilhelm—Assistant (See defendant Wilhelm List, *supra*, for biographical data)
LEHMANN, RUDOLF	KELLER, Dr. Rupprecht von—Main Counsel (See defendant Georg von Schnitzler, *supra*, for biographical data) GRUENEWALD, Dr. Otto—Assistant 1. 1892, Bad Wimpfen 2. Zipfan/Odenwald 3. Universities of Heidelberg and Giessen 4. Referendar, Assessor, Doctor of Jurisprudence 5. SA Member 1933–1937 6. Pending 7. High Command, German Army
REINECKE, HERMANN	SURHOLT, Dr. Hans—Main Counsel (See defendant Otto Rasch, *supra*, for biographical data) BEIER, Dr. Walter—Assistant (See defendant Walter Kuntze, *supra*, for biographical data)
REINHARDT, HANS	FROHWEIN, Dr. Friedrich—Main Counsel 1. 1898, Marburg 2. Wittelsberg 3. University Marburg 4. Referendar, Assessor 5. NSDAP 1937–1945 6. Category IV 7. Civil Judge at Marburg HEIDKAEMPER, Otto—Assistant 1. 1901, Lauenhagen 2. Bueckeburg 3. War Academy, Berlin, 1933–1935 4. 5. No Party affiliation 6. 7. Major General and Chief of the General Staff, Army Group Main
ROQUES, KARL von	TIPP, Dr. Edmund—Main Counsel (See defendant Paul Barnickel, *supra*, for biographical data)

	VOELKL, Dr. Konrad—Assistant 1. 1910, Nuernberg 2. Nuernberg 3. Universities of Berlin and Erlangen 4. Referendar, Doctor of Jurisprudence 5. NSDAP 1937–1944 6. Category IV 7. Referendar, City of Nuernberg
SALMUTH, HANS von	GOLLNICK, Dr. Kurt—Main Counsel 1. 1889, Berlin 2. Scheidegg 3. University of Berlin 4. Referendar, Assessor, Doctor of Jurisprudence 5. No Party affiliation 6. 7. Law practice, Berlin
	MOELLER, Otto—Assistant 1. 1906, Rodenberg 2. Hagenburg 3. University of Hamburg and Berlin 4. Referendar, Assessor 5. NSDAP 1933–1940; Blockleiter 1933–1940 6. Category IV 7. Law practice, Berlin
SCHNIEWIND, OTTO	MECKEL, Hans—Main Counsel 1. 1910, Moers-Asberg/Niederrhein 2. Hamburg 3. Gymnasium Heidelberg; Marine School, Flensburg 4. Graduated 5. No Party affiliation 6. 7. U-Boat commander and radar officer, German Navy
SPERRLE, HUGO	GOLLNICK, Dr. Kurt—Main Counsel (See defendant Hans von Salmuth, *supra*, for biographical data)
	WEIZ, Dr. Gerhard—Assistant (See defendant Karl Eberhardt, *supra*, for biographical data)
WARLIMONT, WALTER	LEVERKUEHN, Dr. Paul—Main Counsel 1. 1893, Luebeck 2. Hamburg 3. Universities of Edinburgh, Freiburg, Munich, Koenigsberg, Goettingen, and Berlin 4. Referendar, Assessor, Doctor of Jurisprudence 5. NSDAP 1937–1945 6. Category IV 7. German Counsel, Taebris; Law practice, Berlin

GIESE, Hans Richard—Assistant

1. 1915, Altona
2. Kiel
3. Universities of Goettingen, Frankfurt, and Kiel
4. Referendar, Assessor
5. No Party affiliation
6. Category V
7. No prior practice

WOEHLER, OTTO

RAUSCHENBACH, Dr. Gerhard—Main Counsel

(See defendant August Frank, *supra*, for biographical data)

KOHR, Ludwig—Assistant

(See defendant Paul Blobel, *supra*, for biographical data)

Appendix R

10 April 1947

MEMORANDUM

Subject: Interrogation procedures

To:			
	Mr. Ervin	Dr. Kempner	Mr. Sprecher
	Mr. LaFollette	Mr. Denney	Mr. Lyon
	Mr. DuBois	Mr. McHaney	Mr. Thayer

1. In general, the policy of this office is to conduct interrogations in the German language, using personnel who are skilled and experienced in interrogation work.

2. This policy is not, however, an inflexible one. The Interrogation Section is not large enough to conduct all the interrogations that are necessary. A number of lawyers and research analysts outside of the Interrogation Section speak German and are thoroughly qualified to interrogate in German. In a number of cases, we have found it desirable to conduct interrogations in English, where non-German speaking attorneys wished to interrogate, themselves, to develop points.

3. For the most part, this system has worked well. However, under present circumstances, there are a number of attorneys doing extensive interrogation work in English and it is important that all interrogations, no matter who conducts them, be carried out in conformity with the general principles of interrogation which we have endeavored to follow from the outset.

4. An interrogation normally is conducted for one of two purposes:

a. to obtain reliable information needed for the preparation of the case, or

b. to obtain affidavits embodying information or admissions in such form that they can be offered in evidence before the Tribunals. It goes without saying that in all cases the information or admissions must be obtained voluntarily and without threats, intimidation, or promises of any kind.

5. There is no point in trying our cases in the interrogation rooms. The exposure of falsehood, or misleading or incomplete statements, by confronting the person being interrogated with documents or prior inconsistent statements, is useful only if it advances the purposes of the interrogation as set forth in paragraph 4. A cross examiner's "victory" over a witness may sometimes be useful in open court, but it is quite useless in the interrogation room.

6. The general procedures governing interrogations, established by the Chief of the Evidence Division, should be scrupulously observed, so that our records of interrogations may be complete, so that the information produced by interrogations can be made available to all who are interested, and so that the observance of the general standards of interrogation can be insured.

[Initialed] T. T.

cc—Mr. Rapp

Appendix S

Prison for War Criminals
Landsberg/Lech, March 1949

To Our Relatives and Friends,

Visitors who are permitted to stay but a few hours, mail and packages—that has constituted for years past the only connection with our dear ones and the only way of hope in our present existence. Therefore, the more do those feel their cruel lot who, apart from their other burdens, have no such possibilities to alleviate their sufferings. There are approximately 70 among us, who, due to the war, are entirely on their own, whose relatives live in foreign countries from where they can at best receive some mail, or whose families have been driven from their homes and who have hardly enough for themselves. You yourselves have experienced the distress and dispair of the post-war years and you will know, too, what it means to have nothing but prison food which constitutes the minimum subsistence.

The order restricting parcels and packages to two per month, which has been in effect for several weeks, has considerably limited, or even made impossible altogether, the assistance we were only too glad to render to our needy comrades.

Therefore, we now appeal to you. Please accept sponsorships for mailing packages. If you yourselves should not be in a position to do so, solicit among your friends. If several families pool their efforts and take turns sending a package or parcel a month to the person they sponsor, this would reduce the sacrifice for the individual sponsors and be of help to our comrades.

Please inform us soon of the addresses to whom we could forward the name of a "sponsored person to whom packages are to be sent". If the individual sponsors should have special preferences as to who should be selected, we shall give them due consideration.

Aid us to lend a helping hand and be assured of our gratitude.

The Landsberg Prisoners.

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